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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
FOR THE COUNTY OF YAVAPAI

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2011 DEC -6 AM 9:56
SANDRA K. MARKHAM, CLERK
Jacqueline Harshman

STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.)
)
JAMES ARTHUR RAY,)
)
Defendant.)
_____)

Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WARREN R. DARROW
TRIAL DAY FIFTY-ONE
JUNE 7, 2011
Camp Verde, Arizona

ORIGINAL

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
2 FOR THE COUNTY OF YAVAPAI
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4 STATE OF ARIZONA,)
5 Plaintiff,)
6 vs.) Case No. V1300CR201080049
7 JAMES ARTHUR RAY,)
8 Defendant.)
9

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15 BEFORE THE HONORABLE WARREN R. DARROW
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INDEX

EXAMINATIONS	PAGE
WITNESS	
DAWN SY	
Direct by Ms. Do	118
Cross by Mr. Hughes	223
Redirect by Ms. Do	255

EXHIBITS ADMITTED

	Number	Page
584	138	
346	155	
345	156	
1082	192	

1 APPEARANCES OF COUNSEL:

2 For the Plaintiff:

3 YAVAPAI COUNTY ATTORNEY'S OFFICE
4 BY: SHEILA SULLIVAN POLK, ATTORNEY
5 BY: BILL R. HUGHES, ATTORNEY
6 255 East Gurley
7 Prescott, Arizona 86301-3868

8 For the Defendant:

9 THOMAS K. KELLY, PC
10 BY: THOMAS K. KELLY, ATTORNEY
11 425 East Gurley
12 Prescott, Arizona 86301-0001

13 MUNGER TOLLES & OLSON, LLP
14 BY: LUIS LI, ATTORNEY
15 BY: TRUC DO, ATTORNEY
16 355 South Grand Avenue
17 Thirty-fifth Floor
18 Los Angeles, California 90071-1560

19 MUNGER TOLLES & OLSON, LLP
20 BY: MIRIAM L. SEIFTER, ATTORNEY
21 560 Mission Street
22 San Francisco, California 94105-2907
23
24
25

1 Proceedings had before the Honorable

2 WARREN R. DARROW, Judge, taken on Tuesday, June 7,
3 2011, at Yavapai County Superior Court, Division
4 Pro Tem B, 2840 North Commonwealth Drive,
5 Camp Verde, Arizona, before Mina G. Hunt, Certified
6 Reporter within and for the State of Arizona.
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PROCEEDINGS

THE COURT: We're on the record in State versus James Arthur Ray. Mr. Ray is present, represented by Mr. Li, Mr. Kelly, and Ms. Do. The state is represented by Ms. Polk and Mr. Hughes.

Ms. Polk.

MS. POLK: Good morning, Your Honor. I also want the record to reflect that some of the victim representatives are here. We have the daughter of Liz Neuman with her husband and her baby. Her name is Andrea Puckett. And her husband is Jason, and the baby is Lauren. And then also the cousin of Liz Neuman, Ms. Lily Clark.

Thank you, Your Honor.

THE COURT: This is the time set for oral argument on the Rule 20 motion. And I've read the motion and the response. I want to ask the parties how -- how much time you're going to request for argument.

Mr. Li, it's your motion.

MR. LI: Your Honor, 45 minutes to an hour. Depends on how many questions the Court has and what I need to respond to.

THE COURT: Okay. I really -- you need to divide the time. The -- the briefs exceed the page

limit, of course, by considerable multiple. And I -- I approve that for both sides. Roughly 50 pages were devoted by each side to the issues. So I do want oral argument concluded right around 5 noon.

Ms. Polk, how much time are you going to request?

MS. POLK: Your Honor, I would request the same amount. Depends on what Mr. Li raises. But if the Court could let us know in advance what our time limits are, I'm sure both parties would stay within the time limit.

THE COURT: Well, I'm looking at -- with a break, there would be 45 minutes apiece at this time. Okay? If that's going to be an issue, we can take it up then. But I ask the parties at this time to utilize -- to use that 45 minutes each side.

MS. POLK: And is that -- are you going to provide the defense with extra time for a rebuttal or reply or a total of 45?

THE COURT: Total of 45 minutes.

Okay.

Mr. Li.

MR. LI: Your Honor, thank you.

Your Honor, I would begin this argument by noting that people all over this country, all over the state, engage in consensual legal and sometimes risky behavior and activity every single day. Horseback riding, bungee jumping.

I -- this weekend I pulled some -- just off the internet some things in Prescott, including a bull ride -- bull riding competition at the Prescott rodeo grounds. That will be on August 13th this year. People can sign up with -- to work the rodeo. There are all sorts of risks associated with that. People do all sorts of activities.

There's a horse race that I also pulled up that -- that starts in Prescott. It's called the Prescott -- "Man Against Horse Prescott Endurance Club Race."

These are all risky activities. And the reason why I bring this up, Your Honor, is to put this particular case into context. We have been working on this case for two years, Your Honor. Ms. Seifter is a former supreme court clerk. We've had another former clerk who's clerked for two justices working on this case. There are other lawyers who have been researching diligently for the last two years relating to this case --

approximately two years.

And I bring that up because with all that legal firepower and all the computerized research technologies available, we have not found, nor has the state found, a single case supporting criminal prosecution of any kind involving consensual activity with adults.

I mention this because it's instructive about how unprecedented and how unsupported the prosecution's case is here. And I know this Court has repeatedly mentioned and noted that many, many different times that this case is unique, that it's unprecedented, that there are new legal issues that this Court has not dealt with before on numerous occasions.

And I would submit, Your Honor, that -- that no court in the United States that -- that we are aware of, given all that legal firepower, we -- we have not found a single case, a single court in any jurisdiction, that has dealt with facts like these.

And that's instructive because the reasons why these types of cases don't exist hinge on some very basic legal concepts, concepts such as due process, the First Amendment, the lack of a

1 legal duty, and the assumption that all people in
2 the United States who are adults, who are
3 competent, they all possess freewill.

4 And those are very important concepts
5 that will -- that are woven throughout this case
6 and that the state has never adequately dealt with.

7 I would also remind the Court that the
8 reason that there are no -- or the fact that there
9 are no cases that address similar circumstances,
10 even close to similar circumstances, tells
11 something about this prosecution, that this is
12 literally the only prosecution of its kind we have
13 ever found.

14 And that's one of the reasons,
15 Your Honor, that many of our legal arguments have
16 been so unbounded by legal principles. And -- and
17 I don't mean to say that the Court is not applying
18 legal principles or attempting to apply legal
19 principles. It's just that when we approach
20 sidebar to make an argument about something or when
21 we file a motion or when the state makes some
22 argument about what it's intending to prove or the
23 relevance of a particular piece of evidence, there
24 are no cases that can guide this Court, no cases at
25 all, that explain how we come to one ruling versus

1 another. And it's all fresh. It's all --

2 And what I'm trying to say is, of course,
3 Your Honor, is taking existing precedent and
4 attempting to apply it to these circumstances. But
5 normally, in a normal criminal prosecution, if
6 you're dealing with a homicide case, you've got 12
7 other homicide cases that have the same types of
8 facts and that sort of lay out what the guidelines
9 should be and how this court should rule.

10 In this particular case, every time we
11 come to the sidebar to talk about an issue -- and I
12 don't want to say every time, but very often when
13 we come to talk about a very substantive issue,
14 there are no cases. And the reason is because no
15 prosecution like this has ever taken place.

16 And that's important, Your Honor, because
17 legal precedent is the way our system makes sure
18 that everybody understands what the rules are and
19 that a criminal prosecution is founded on
20 well-established principles of law. Criminal
21 prosecutions, unlike civil prosecutions, are not
22 the place to try out new, interesting,
23 controversial arguments. Criminal prosecutions
24 need to be founded in precedent and in law.

25 Your Honor, I'm going to -- I'm going to

1 use my time, and I may reserve a little bit, but
2 I'm going to discuss a few topics with this Court
3 that are covered by our brief but that also
4 attempts to address some of the arguments that have
5 been brought up by the state in its brief.

6 These are four topics. One is what is
7 the state's case as we understand it? Two is the
8 state's failure to establish a legal duty. Three
9 is the state's failure to establish mens rea. And
10 four is the state's failure to establish causation.

11 Just starting with the state's case. We
12 have never -- throughout this prosecution from the
13 beginning to the end, we have never been presented
14 a concise and complete, carefully constructed
15 definition what the criminal acts are. We've
16 gotten a melange of -- of arguments and facts, all
17 of -- many of which are somewhat prejudicial in one
18 way or another. But we have never had an
19 articulation what the actus reus is and what the
20 mens rea associated with that particular actus reus
21 is.

22 Those are critical elements in order to
23 establish a crime. And this has prejudiced us
24 throughout this case because what the state has
25 done from the beginning is throw out a lot --

1 including in this particular motion, 49 pages of
2 it, just throw out as many facts as they can think
3 of without explaining which facts constitute the
4 criminal conduct to which the -- the mens rea can
5 be attached. We have a lot of facts but we don't
6 have an explanation of which ones of these facts
7 are criminal and how the mens rea attaches to that.

8 Is it a five-day crime? Is it a two-day
9 crime? Is it a one-day crime? Is it a two-hour
10 crime? Is it a 30-minute crime? That has never
11 been established.

12 I will -- I will submit to the Court that
13 early on in this case when we were talking about
14 whether or not the audiotapes should be admissible,
15 there was a line in the state's case and indeed a
16 theme that has pervaded the state's case that this
17 is not about the sweat lodge alone, that the crime
18 actually started at the beginning of the seminar.
19 So there was a five-day crime.

20 And, in fact, the -- the last sentence of
21 one of their pleadings says that the -- that the
22 defense would like very much for this to only be
23 about the sweat lodge and that the criminal conduct
24 is only about the sweat lodge. But in fact, the
25 criminal conduct extends all the way from the

1 beginning of the seminar to the end.

2 It is critical that when this Court
3 questions the state as to -- you know -- this
4 argument, what is the crime? What exactly is the
5 crime? We have been left instead to guess and then
6 to shoot at a moving target repeatedly. So let me
7 take a shot right now.

8 As we understand the state's case, the
9 state's criminal case, in the five-day theory, it
10 hinges on a number of facts, many of which I will
11 submit to this Court have no legal relevance
12 whatsoever. Okay? But I will -- I will read them
13 out as best as I understand them.

14 Mr. Ray had a seminar for which people
15 paid approximately \$10,000. During the seminar --
16 and I'm pulling this in large part from the state's
17 pleadings. During the seminar Mr. Ray encouraged
18 participants to play full on. Many of the
19 seminar's events challenged people. Apparently
20 Ms. Brown was disappointed early on that she had
21 been eliminated from the Samurai Game. And we
22 heard testimony about -- about her disappointment
23 relating to the Samurai Game.

24 Two of the decedents, Ms. Brown and
25 Ms. Shore (sic) participated in the Vision Quest.

1 It is, Your Honor, I would note, undisputed that
2 neither one of those participants exhibited any
3 signs of dehydration in their autopsy, a fact that
4 is critical.

5 Ms. Neuman, however, did not participate
6 in the Vision Quest and was, according to the
7 state's theory of the case, chastised for drinking
8 wine and for making noise the night before the
9 sweat lodge.

10 The state alleges that these conditions,
11 Your Honor, in the case of Ms. -- Ms. Brown and
12 Mr. Shore participating in this seminar and doing
13 the Vision Quest and doing the Samurai Game and
14 meditating and what have you, that these events
15 conditioned those participants to follow Mr. Ray's
16 directions in the sweat lodge.

17 That's been the state's theory. That's
18 why all that -- that evidence relating to the
19 Samurai Game was purportedly admissible to this
20 jury, because they were being conditioned by
21 Mr. Ray to follow his instructions in the sweat
22 lodge.

23 Those same arguments, of course, do not
24 apply to Ms. Neuman because she did not participate
25 in any of those events. And, in fact, the only

1 argument the state has proffered as to what
2 conditioned her -- conditioned her, quote, unquote,
3 to follow Mr. Ray's instructions is that they had a
4 discussion about drinking wine the night before the
5 incident. That is literally the only -- the only
6 conditioning element that the state has proffered.

7 Before the sweat lodge ceremony Mr. Ray
8 suggested that participants might experience an
9 altered state. He told them, metaphorically, that
10 they would face death and be reborn. I note
11 Your Honor, that in your brief -- in the brief that
12 the -- that the state has supplied to you, the --
13 they cite a number of statements from the -- what
14 we've called the pregame speech, Your Honor. And I
15 would just note for the record that they are often
16 taken out of context. Certain portions are --
17 are -- are taken out.

18 So, for instance, when there's a
19 discussion about death, the very next line, which
20 says -- and this is why this is such a great
21 metaphor, is removed from the -- from the text that
22 has been provided to the Court. I know the Court
23 has heard the actual tape. I would recommend
24 that -- that to the extent that the Court relies on
25 the pre -- the pregame speech, that the Court would

1 listen to the entire tape or at least read the
2 transcript or -- or listen to the evidence in
3 context.

4 Giving -- giving the state the benefit of
5 the doubt for purposes of Rule 20 does not require
6 the Court to just give the state the ability to
7 edit things the way it sees things. The -- the
8 evidence is still just the evidence, and the Court
9 has every power to actually look at the complete
10 body of evidence as opposed to what's been selected
11 out by the state.

12 Mr. Ray allegedly instructed participants
13 to leave only between rounds. We agree with that.
14 Mr. -- okay. So these are some additional acts.
15 Mr. Ray controlled the level of heat and humidity.
16 He controlled the length of the rounds. People
17 claim that several participants said that -- either
18 said that they themselves were in distress or that
19 they identified other people who were in distress.
20 Dennis Mehravar yelled out that he was having a
21 heart attack. Lou Caci burned himself in the rock
22 pit.

23 And then here are the three -- here are
24 the three key parts to the state's case. These --
25 these are actually the -- the center of gravity for

1 the state's case. That Mr. Ray did not check on
2 any of these people, that he did not aid any of
3 these folks, and that he did not stop the ceremony.
4 Those are the key elements of -- of the state's
5 case.

6 One other point I would make, Your Honor,
7 and -- and I'm sure the Court noticed this. But in
8 the state's pleading repeatedly they quote your
9 ruling of February 28th, 2011, for the proposition
10 that -- that this pregame speech was evidence of
11 Mr. Ray's intent and that it demonstrated a
12 reckless disregard for safety and that it -- it
13 illustrated that the folks -- you know -- that
14 Mr. Ray knew that people would follow his
15 instructions unto death.

16 Your Honor, for the record, the Court as
17 of February 28th, 2011, had not yet heard the tape.
18 This was just an evidentiary ruling in which the
19 Court said it's possible that evidence such as this
20 could demonstrate those things. The Court did not
21 find, and I -- I think the Court would agree, did
22 not actually find, as is suggested in the state's
23 brief, that that pregame speech that the Court had
24 not even listened to as of February 28th, 2011,
25 actually established that. I think the Court was

1 simply saying it's possible that it might be
2 relevant to that issue.

3 Now, those are the facts as -- as we
4 understand the state has presented them to this
5 jury and to this Court. I will -- I'm going to
6 move back to those facts in a second to -- to
7 discuss the difference between an act and an
8 omission. But that is, as far as I understand it,
9 the -- the -- the facts.

10 Now, Your Honor, I would -- I would
11 recommend -- because this is how I did it, but --
12 you know -- obviously, the Court can do it however
13 it wants to do it. But I did -- I did this. I --
14 I wrote -- I wrote on a pad of paper in two
15 columns. I wrote the acts and the omissions.
16 Okay? So I wrote every act the state could
17 articulate. You know. Putting more rocks, saying
18 one thing, having the seminar, all of those sorts
19 of things.

20 And then I wrote the three omissions that
21 I could think of, which were failure to check on --
22 on folks, failure to render aid, and failure to
23 stop the seminar -- or failure to stop the
24 ceremony. And I wrote those two there. And I'm --
25 I'm going to show you why that -- that is actually

1 helpful in a second. Those are the facts as we
2 understand them.

3 Now, let's turn to what the duty is or is
4 not. The state throughout this litigation has
5 taken multiple and conflicting positions on whether
6 it needs to identify any duty, any established
7 duty, in order to prosecute Mr. Ray for an
8 omission.

9 The state first argued that it was not
10 required to find any duty outside of that found in
11 the criminal statute. That was first argued orally
12 by Mr. Hughes and subject to some fairly rigorous
13 examination -- cross-examination, I might say, from
14 the Court as to whether or not the state's position
15 really was that for an omissions case the state did
16 not have to show a duty outside of the criminal
17 statute. The state took the position firmly on the
18 record to this Court that they did not have to show
19 a -- a duty outside of that found in the criminal
20 statute.

21 Now -- but the state -- that could be
22 excused because maybe the state just didn't know
23 what the law was at that minute and was put on the
24 spot and was being asked to -- to make an argument
25 on the spot.

1 But that error was compounded on
2 March 21st, 2011, when the state filed a brief in
3 which at page 4 the state alleged that -- that it
4 did not have to provide any duty outside of that
5 found in the criminal statute. That's at page 4 in
6 the state's filing on March 21st, 2011.

7 Then the state acknowledged that if it
8 had to prove a duty, two duties would apply. One
9 was the duty -- the common law duty of a proprietor
10 to make his premises safe for customers. That
11 obviously failed because the -- the proprietor in
12 this particular case, the premises is owned by
13 Angel Valley. So any duty along those lines would
14 be owed by Angel Valley to the extent that such a
15 duty applied.

16 Second, the state said that, well, if we
17 have to show a duty, we have -- there might be a
18 common law duty of an employer to an employee.
19 This too failed because to the extent that
20 Ms. Neuman was an employee, she was an employee of
21 JRI. She was a volunteer actually. But even
22 setting that -- that issue aside, to the extent
23 that she had an employment-type relationship, it
24 was with JRI and not with James Ray personally.

25 I point these out, Your Honor, not -- not

1 as a -- a game of legal gotcha. The reality of it
2 is that it's all wrong. All of the state's -- all
3 of the various state's positions have been wrong.
4 But that's not even the reason why I'm pointing
5 this out. The reason why I'm pointing it out is
6 because due process requires that the defense know
7 what actually the theory of the case that the state
8 is bringing is.

9 The cases are replete with that
10 requirement. You cannot just come into court as
11 the government and throw up as many arguments as
12 you can and then ask defense to try to figure out
13 which one it is and then ask the Court to figure
14 out which one it is and then ask the jury to figure
15 out which one it is. It's critical for our process
16 to work that the state define actually what its
17 case is.

18 And I -- and I point the fact of this
19 legal duty issue out to this Court because the
20 state has never articulated properly what that duty
21 is. I will address in a second the new duty that
22 they're alleging as of June 6th, 2011, the new
23 duty. I will -- I'll deal with that. As of
24 2:00 o'clock yesterday there was a new duty. I'll
25 deal with that in a second.

1 But the critical fact is that for the
2 last three months, as -- as we sit here in trial,
3 as we've adduced testimony from witnesses, as we've
4 argued to this Court, both in writing and -- and
5 in -- in -- at sidebar and at bench -- I mean, at
6 counsel table, when we've made our various legal
7 rulings and this -- arguments and this Court has
8 made various legal rulings for the last three
9 months. And I note Sundling and Pace, just as
10 examples of -- of important rulings that dealt with
11 the issue of duty. The state has sat silent as to
12 what that duty is beyond those arguments that it
13 made on March 21st, 2011. Okay?

14 So we've had all of this legal landscape
15 moving around, all of these rulings that this Court
16 has made based on the state's articulation of its
17 case as of March 21st, 2011.

18 And, indeed, the Court has found and
19 acknowledged unlike -- this is the Court's ruling
20 on Mr. Sundling of March 25th, 2011. Unlike the
21 considerable body of law, considerable body of law,
22 that has developed concerning the duty of a coach
23 or instructor to invite -- sorry -- avoid
24 increasing the risks inherent in learning or
25 participating in sports-type activities, there is

1 apparently no such law relating to duties arising
2 from what some people consider to be, at least in
3 part, religious or spiritual seminars that might
4 produce, quote, unquote, altered states. That was
5 the Court's ruling as of May 25th, 2011.

6 And still the state did not say, well,
7 we've got this new duty, Your Honor, that we want
8 to talk about -- we want to talk about. That
9 ruling, the -- the -- the May 25 ruling, is
10 correct.

11 There was another ruling on
12 April 11, 2011, relating to Steven Pace. And --
13 and I want to note just the part that the Court
14 cited. This was -- this was, as the Court will
15 recall, the admissibility of Mr. Pace's testimony
16 to establish a duty of care relating to outdoor
17 activities and what have you.

18 The Court block quoted a cite from
19 State v. Far West. The Court wrote -- this Court
20 wrote, the Arizona Court of Appeals in that case,
21 Far West, stated that, quote, we do not suggest
22 that a breach of every common law, statutory, or
23 other duty is potentially criminal. Indeed the
24 facts of this case present unique, unusual, and
25 extraordinary circumstances where the risk of harm

1 was great and the conduct particularly egregious.

2 And then moving down, based on
3 that Court -- based on the Far West case, this
4 Court found that Mr. Pace's testimony would not be
5 relevant for a number of reasons. But the -- but
6 the key cite, Your Honor, is that in Far West this
7 Court, Your Honor, note -- noted that not every
8 duty that you can come up with in the common law,
9 statutory law, or what have you, will result in
10 criminal liability. And there's good reason for
11 it.

12 As the U.S. Supreme Court has found, a
13 duty of care upon which a duty to act is premised
14 must be so firmly established as to be beyond
15 controversy or dispute if it is to provide presumed
16 notice. That's critical, Your Honor.

17 Under the due process clause of the
18 United States Constitution, in order for there to
19 be a duty to act, it must be so firmly established
20 as to be beyond controversy or dispute. That's the
21 law.

22 And so what we have here, Your Honor,
23 is -- and that's the law that Far West acknowledged
24 in saying not every duty that you can come up with
25 in the civil law is going to provide some duty to

1 act. And the law in general is -- is quite adverse
2 to providing duties to act to people. Arizona is
3 even more adverse to creating duties for people to
4 act.

5 Your Honor, one point that is critical in
6 this analysis here is the issue of waivers.
7 Because even assuming that there might have been
8 some duty somewhere, which the state has never
9 articulated, it is black letter law that waivers --
10 an express waiver can eliminate a duty of care.

11 And I'm going to cite Valley National
12 Bank versus National Association for Stock Car Auto
13 Racing, Hildebrand versus Minyard. These are in
14 our -- our case, in our brief. The law of
15 negligence in Arizona, Section 712. This is
16 fundamental.

17 In order for people to be able to engage
18 in the activities they want, including rodeo riding
19 on bulls, for instance, they've got to be able to
20 contract with each other to decide that -- you
21 know -- this is the release for -- for the Prescott
22 Frontier Days and for the rodeo.

23 It says agrees -- agree to release all
24 claims, including negligent rescue operations. I
25 mean, it even goes so far as to say that not only

1 am -- will I not make a claim for my injuries
2 arising out of bull -- you know -- out of being
3 thrown off a bull, but if there's a negligent
4 rescue, I also waive any -- any liability arising
5 out of that.

6 And the reason is because otherwise
7 people can't do this. They can't ride bulls. They
8 can't have rodeos. And -- and -- and that's not
9 what the -- the -- the law provides. The law
10 provides that otherwise legal and consensual but
11 perhaps risky activities can be contracted. You
12 can contract your relationship with -- with -- with
13 the person who's supplying that to you.

14 And in this case it's undisputed that --
15 that the participants contracted with JRI. And the
16 Court has heard -- you know -- quite a bit of
17 testimony and has seen the -- the waivers
18 themselves, and they're quite complete. And those
19 waivers eliminate any duty of care as is provided
20 by black letter law in both Arizona and the rest of
21 the country.

22 So let -- let me just move -- so -- so
23 there is no legal duty, Your Honor. And if there
24 was a legal duty, it was contracted away.

25 So let me bring us back to the whole

1 little exercise that I -- I had this idea about --
2 you know. And I'm not going to insult the Court's
3 intelligence by writing it up there. But -- but
4 really, I wrote this all down. I wrote every act
5 that the state could allege. And when the state's
6 making its arguments, I recommend the Court just
7 write every act that it says on one -- in one
8 column and then all the things that are omissions.

9 And I would submit to this Court that if
10 you place your hand over the part that says
11 "omissions," you don't have a crime. That's --
12 that's the critical feature of the state's case.

13 You know, let's take the worst set of
14 facts that the state wants to allege. Somebody
15 said that -- that a participant was having trouble
16 breathing, something like that, in the very last
17 round. Mr. Ray continued the sweat lodge. And the
18 omission is he did not check on that person, did
19 not render aid to that person, and did not stop the
20 sweat lodge. If you take those out, you don't have
21 a crime, even under the state's theory.

22 Just -- and -- and -- and the way I would
23 posit it to this court is imagine that somebody
24 said those things that the -- the state is alleging
25 were said. And instead of the tragic accident that

1 happened, somebody simply -- Mr. Ray simply got
2 somebody and pulled them out and they recovered.
3 Then we wouldn't have a crime because -- and that's
4 what happened repeatedly prior to the tragic last
5 couple rounds. Prior to that when people said --
6 you know -- hey, I got a problem over here, they
7 were taken out. They were aided.

8 The critical difference here is that the
9 state alleges that those facts, the worst --
10 whatever worst set of facts you want to put, when
11 combined with the omission created the criminal
12 liability.

13 If -- if the Court doesn't believe that,
14 then I would ask this Court to ask itself why
15 almost every single participant witness, every
16 single one, was asked whether Mr. Ray checked on
17 anyone, whether Mr. Ray ended it -- rendered any
18 aid. Why -- why would that be relevant if this
19 wasn't a case about omissions?

20 I would also note, Your Honor -- and this
21 is something that obviously you've seen us jump up
22 and down about over and over and over again. But
23 repeatedly the state has brought into question --
24 brought questions about the adequacy of the
25 first-aid kit, the training, whether there was an

1 AED, all sorts of other sort of basic
2 civil-negligence kind of arguments.

3 If this was not a case in which the state
4 was in some way trying to suggest that an -- an
5 omission, that -- that Mr. Ray should be prosecuted
6 because he failed to do stuff, then I would ask
7 this Court, what was the relevance of any of that?
8 Why -- why did we sit through days of testimony
9 with that over our objection? The reason is
10 because the state thinks and has confused basic
11 civil -- civil negligence problems with the
12 criminal law.

13 Let me -- let me just address this new
14 issue, this new duty of -- creation-of-peril duty
15 the state has now alleged four months into trial.
16 Just starting with the simple proposition that
17 it's -- it's illegal to put on a criminal case and
18 then after the criminal case, the state has closed
19 its case, argue a new theory that has completely
20 different factors involved, that has completely
21 different issues that must be resolved by this
22 Court, and that is a completely different theory.

23 The duty of peril or creation of peril --
24 that duty arises when the victim is -- becomes
25 helpless. That's when the duty arises. So I

1 just -- I would -- I just point this out. We've
2 only had a little time to digest this theory. But
3 I would just point out that it's sort of the gulf
4 between what the state's position was when we
5 started this case and all the litigation we had
6 over what was relevant to this jury about -- you
7 know -- Samurai Games and -- and conditioning and
8 all of those sorts of things and this new theory.
9 Okay?

10 I admit that it's -- it's arguable. I
11 mean, without -- without sort of withdrawing our
12 various objections to the Samurai Game and all of
13 that, I can understand a ruling that would say,
14 well, that's admissible to show -- if this is a
15 five-day crime, if this was a -- you know -- if the
16 case really is about conditioning people into doing
17 things, okay, we'll put it on.

18 That's a very different case than the
19 duty of creation of peril, which really takes place
20 when the defendant -- and -- and frankly has only
21 in the civil -- has only ever been used in the
22 civil context -- when the defendant becomes aware
23 that the victim is helpless. Now, you're
24 talking -- you've gone from five days to 15, 20,
25 30, 40 minutes -- 30 minutes. Those are very

1 different cases. And the -- and the fact that the
2 state can just pop up with this new theory after
3 the close of its case in its Rule 20 argument is
4 not permitted.

5 I would site to this Court a very
6 important case, which is United States versus
7 Beros, which is a Third Circuit case. The site is
8 833 F.2d 455. And this deals with the
9 constitutional requirements of unanimity and that
10 the -- that -- that the jury understands what it
11 actually is ruling on. And I would submit to this
12 Court that even though this -- you know -- Court
13 is -- does not have the -- obviously has far more
14 experience than the jury in -- in -- in making
15 these decisions, this Court also has to make a
16 ruling as to what actually the crime is if -- if --
17 if the Court is going to decide to deny a Rule 20
18 motion.

19 And that also requires that the state
20 articulate what its theory actually is. And it has
21 not done so. And it just comes up with new
22 theories that it throws out in pleadings, in
23 arguments, whatever, none of which give the defense
24 any notice at all as required under the due-process
25 clause.

1 We are not in a position to defend if
2 this new theory pops up after the close of evidence
3 and has never been disclosed despite four months of
4 trial. Not only is -- is it just new, it was
5 explicitly disavowed by the state months ago.

6 At page 10, the state wrote of its audio
7 defense -- or audio -- the response to our
8 objections to the audio recordings. The state
9 wrote, the defendant wants to believe that his
10 conduct begins and ends with the three-hour period.
11 Because that was our position at the beginning of
12 this case, Your Honor. We thought this would be a
13 much shorter case. We thought it would be the
14 about the three hours of the sweat lodge. We
15 thought that would be it.

16 But the state instead chose a completely
17 different theory, which is this sort of a grand
18 theory about conditioning and how Mr. Ray through
19 his words and actions conditioned people to not
20 listen to themselves and ultimately unto death.

21 We objected to that theory. Over our
22 objections, the state produced -- you know --
23 months of testimony relating to that and explicitly
24 disavowed the idea that this case was only about a
25 three-hour period. The state wrote, the conduct --

1 the defense -- the defendant wants to the jury to
2 believe that his conduct begins and ends with the
3 three-hour period. It does not.

4 I would cite for this Court's perusal the
5 due-process cases at page 8, footnote 3, of our
6 motion that relates to the idea of articulating new
7 theories at the end of a case. But there is an
8 event more problematic concern, Your Honor. And it
9 is this. And -- and this is -- this is -- we're
10 guided by Gipson v. Kasey, which is an Arizona
11 Supreme Court case, 214, Ariz. 141, 2007. So this
12 case is a Supreme Court case. And it postdates the
13 two cases cited by the state, the case involving
14 the railroad and the case involving the
15 organophosphate poisoning of -- of a -- a tenant
16 in -- in her -- in her apartment. So this case
17 postdates those two cases.

18 Gipson stands for three major
19 propositions of law that have critical importance
20 to this case. The first is that -- and this one
21 is -- I know the Court knows this, but it's black
22 letter law. Arizona does not liberally create
23 duties to act. The whole country is very reticent
24 about creating a duty to act. But Arizona in
25 particular is very hesitant and does not liberally

1 create duties to act.

2 And there are a lot of reasons for -- a
3 lot of policy reasons for it, but they have to do
4 with personal responsibility. And -- and this --
5 this state features that policy concern heavily.

6 Gipson stands for the proposition,
7 secondly, that this Court must decide whether a
8 duty applies before the case goes to the jury.
9 It's not a jury question. It is not that the jury
10 should come -- come up with 12 factors and if they
11 find these 12 factors and the Court makes the
12 decision as to whether or not there's a duty.
13 That's not how Arizona law works. I would refer
14 this Court to Gipson. It is quite explicit on that
15 point.

16 So it will not be a remedy to simply give
17 the jury you -- you know -- you must find the
18 following 12 conditions and then this Court makes
19 some decision about -- about duty to act. That is
20 simply not the law under Arizona Supreme Court
21 precedent directly on point on that issue.

22 And in determining whether a duty
23 exists -- this the third proposition that Gipson
24 stands for -- the Court cannot consider specific
25 details of conduct or other factual inquiries,

1 like, in that case, foreseeability that are
2 reserved for a jury.

3 So, in other words, Your Honor, there are
4 a lot of disputes here about what was foreseeable,
5 what wasn't foreseeable, did Mr. Ray know somebody
6 was in distress, did Mr. Ray know somebody was
7 helpless? You know, and if this were a civil case,
8 it's possible that you could have a civil lawsuit
9 over whether Mr. Ray should have done one thing
10 versus another.

11 But this is a criminal case. And this
12 duty of peril has never, ever, ever been used in
13 Arizona, ever, to establish criminal liability.

14 More important and -- you know -- this
15 goes again to the waiver issue. More importantly,
16 to the extent that there was a duty and to the
17 extent that the state is arguing, well, by putting
18 people in a sweat lodge -- by having this sweat
19 lodge ceremony, you put people in peril. That's
20 what they argue. To the extent that they're
21 arguing that, that's just like the -- the rodeo.
22 Yeah. You know what. You put a bunch of people on
23 bulls, they fall off, they break their neck, they
24 hurt themselves, some die.

25 It is absolutely the case that when you

1 have a rodeo, you put people at risk. But the law
2 allows people to contract their way around that and
3 relieve -- remove the duty so that, one, people who
4 want to ride bulls for competition or for fun can
5 do so, and, two, people who want to put on rodeos
6 can do so without fear of criminal prosecution, let
7 alone civil liability.

8 There is no case law for the proposition
9 anywhere, ever, in any jurisdiction that under
10 these kinds of circumstances where people are
11 engaging in consensual adult activities, they're
12 competent people, they -- they acknowledge a risk
13 and they -- and they sign it away. There is no
14 case anywhere that a criminal prosecution can be
15 brought for the idea of a duty -- putting somebody
16 in peril and then not rescuing them. There is no
17 case, and the state cannot site a case, and this
18 Court would be making new law.

19 And, finally, the cases that cited --
20 that are cited by the state just have -- are -- are
21 so outside the spectrum of what our normal cases
22 and so far away from what our cases are. In
23 Maldonado -- this is the train case -- the -- the
24 folks literally jerked the train purposefully, the
25 guy falls off. He gets run over by the train. His

1 limbs are severed. And they just -- they go on.

2 Setting aside the fact that jerking the
3 train like that could perhaps be constituting an
4 assault in -- in and of itself, this is not legal
5 conduct. This is not consensual conduct. This is
6 criminal conduct. The case, Lariah, involving the
7 organophosphates that were used to -- what happened
8 in that case, the landlord hired a -- you know --
9 some contractor who wasn't particularly well
10 experienced, like a Rotillo Vasquez, and he -- to
11 remove pests. And what he did was not with the
12 landlords -- you know -- not -- not at the
13 landlord's direction. He just used a bunch of
14 pesticide all over the apartment, and the plaintiff
15 got sick.

16 What the landlord then did, which was
17 illegal, was lie about what sort of pesticides had
18 been used and, basically, cover up and not help the
19 poison control people as to what pesticides had
20 been used.

21 This is the kind of case that Far West
22 would say, hey, look. Not every legal duty creates
23 a criminal liability. But when it's really
24 egregious, when the risk is so obvious, yeah, that
25 might be a case where we'll create a -- where we'll

1 allow for there to be a criminal prosecution. So
2 when -- when the facts are as egregious as those,
3 perhaps we'll allow for a prosecution.

4 Your Honor, how much more time?

5 THE COURT: It's 11:50, so you're about 41
6 minutes until you're running out of time.

7 MR. LI: You're kidding. Well, then, I'll --
8 I'll move on.

9 So -- so there is no duty. With respect
10 to recklessness, Your Honor, and -- and,
11 Your Honor, may I ask for a bit more time?

12 THE COURT: Yes.

13 MR. LI: Thank you. With respect to --

14 THE COURT: I'm going to keep track. It's
15 going to be equal time. If we go into the lunch
16 hour, we will -- go ahead, Mr. Li.

17 MR. LI: Thank you, Your Honor.

18 With respect -- so -- so that's the legal
19 duty issue. It's -- it's not -- it's not a firmly
20 established duty as is required under the supreme
21 court to provide notice. It's brought far too late
22 in violation of the due-process clause. There's a
23 waiver, which would mitigate and relieve any such
24 duty. And, fourth, it is simply not the kind of
25 case that is in the heartland of the

1 creation-of-penn cases.

2 Let me deal for a second with the issue
3 of mens rea. The state has taken on itself the
4 obligation of proving beyond a reasonable doubt a
5 reckless disregard for a substantial and
6 unjustifiable risk of death. So it requires -- and
7 I know the Court knows it -- the proof of the
8 subjective, conscious disregard by Mr. Ray of
9 the -- you know -- of the risk of death, a
10 substantial and unjustifiable risk of death.

11 Just a few facts that are -- are
12 undisputed. Fifty -- over 50 people participated
13 in the sweat lodge. There were numerous people
14 outside of the sweat lodge. Despite four months of
15 testimony, not a single witness has testified that
16 they knew somebody was dying or at risk of dying.
17 The testimony is that had anyone known, they would
18 have done something.

19 This is not the kind of case that is
20 within the heartland of recklessness. Those cases
21 involve guns, knives, driving drunk. Those cases
22 involve very explicit obvious -- obviously
23 dangerous activity where everybody knows that if
24 you wave a knife around with enough force to stick
25 it ten inches into somebody's chest, that you're

1 behaving recklessly. This case is far outside of
2 that. There is not a single case anywhere that --
3 that finds recklessness in circumstances similar to
4 this.

5 Critically the Court must look at each
6 decedent separately and what the knowledge was
7 about each of the separate decedents. But before I
8 do that, I want to address a couple of the points
9 that the state brought up in its brief. The state
10 essentially concedes that there's no real evidence
11 of -- of knowledge on Mr. Ray's part.

12 And so instead, what the state says is,
13 well, here's a bunch of cases that show that heat
14 is -- is -- is dangerous, like swinging a knife,
15 basically. And there's pages of this in the
16 state's brief.

17 These cases, Your Honor, are from other
18 jurisdictions, but more importantly they involve
19 children. In -- in state -- People v. Kolzow,
20 that's I think a three-month-year-old child
21 that's -- that's at issue. In People versus
22 Maynard, there's I think two children. One I think
23 is under a year old and one is about three years
24 old. These are children who -- who do not have the
25 ability to start the car, to open the doors to get

1 out. They're in car seats. They're children. The
2 case at bar does not involve children. It involves
3 adults, high-functioning adults.

4 Another case cited by the -- by the state
5 is Lovejoy v. Arpaio. That is an Arizona case.
6 That case, Your Honor, involves a dog as the
7 victim -- Bandit. A dog is presumed by the law not
8 to have the ability to choose or to open doors or
9 to unroll windows. Okay?

10 So the -- the idea that the state cites
11 cases involving children and dogs for the
12 proposition that they don't have to adduce real
13 evidence, you can just assume that it's a dangerous
14 instrumentality, heat is a dangerous
15 instrumentality, it's absurd.

16 And, frankly, it proves far too much
17 because that would mean any instance involving
18 heat -- hiking the Grand Canyon, taking a walk
19 in -- anywhere around here in the summertime, going
20 down to Yuma, sweat lodges, saunas, marathons, you
21 name it -- anything with a car and heat, that is
22 just as dangerous. And -- and the law will hold it
23 so, as shooting a gun at somebody's face, which is
24 the other manslaughter cases that the Court is
25 probably more familiar with.

1 Those are the cases, stabbing somebody in
2 the chest so hard that it -- it goes in ten inches.
3 That's a manslaughter case. You know, they
4 literally are shooting somebody in the face.

5 Or take the Far West case. You've got a
6 sewage facility that has all sorts of toxic --
7 toxic things going on in there, and you violate
8 purposefully -- the corporation violates
9 purposefully the OSHA requirements that are
10 directed at making sure you have a safe workplace.
11 Well, that's obvious.

12 The state's case, by incorporating a
13 bunch of cases about children and dogs, would
14 suggest that any case involving heat falls into the
15 same category as swinging a knife as hard as you
16 can. That's just not the law. There is no case
17 that stands for that proposition.

18 Focusing on the specific individuals, the
19 specific decedents in this case, which -- which
20 this Court must do and which the state must do in
21 order to sustain its burden.

22 The first witness -- or the decedent that
23 probably has the most developed record is
24 Ms. Brown. And -- and the facts are -- the very
25 first witness in this case -- Melissa Phillips --

1 destroys the state's case. She testified -- this
2 is the very first witness on day one of the
3 testimony. She testified that Ms. Brown was
4 chanting, we can do it, as late as the eighth
5 round. That's her testimony. Or very close to the
6 end.

7 Ms. Phillips testified that she raised
8 concerns, Ms. Phillips raised concerns, about
9 Ms. Brown's chanting and breathing and was told by
10 a man positioned close to Mr. Brown (sic), and we
11 know believe that it's probably Mr. Shore, who
12 said, I'm fine. I'm here. It's fine. She's all
13 right. This is literally the first day of
14 testimony.

15 Ms. Phillips knows that that man was not
16 Mr. Ray because it came from totally different
17 parts of the -- of the -- of the sweat lodge. So
18 the very first witness we had testified that a man
19 lying right next to Ms. Brown said, I'm here. It's
20 fine. She's all right.

21 Now, obviously with hindsight, that
22 wasn't true. Okay? That's obvious. And it's --
23 it's a tragedy. But the point is that from the
24 beginning of this case there was evidence,
25 substantial evidence, uncontested evidence, from a

1 state's witness that a person lying next to
2 Ms. Brown indicated that things were okay.

3 Dawn Gordon -- so now we can bookend the
4 whole thing. Dawn Gordon -- that's the first
5 witness. The second-to-last witness, Dawn Gordon,
6 testified -- and this is -- there are only a couple
7 of witnesses who were close enough to testify -- or
8 to actually observe the testimony that they
9 provided.

10 The other witnesses, Your Honor -- Debbie
11 Mercer, Sara Mercer, Fawn Foster -- those folks, as
12 the Court saw me -- you know -- do with the jury,
13 those folks were minimally 23, 24 feet away,
14 maximally 50-odd feet away sitting on a log. These
15 are the people who are literally right next to the
16 folks who passed away who are -- in Fawn
17 Foster's -- I mean in -- in Dawn Gordon's case,
18 literally touching Kirby Brown.

19 She heard the chanting as late as the
20 sixth or seventh round. Ms. Gordon heard breathing
21 until the very end of the ceremony. She said it
22 was misleading to suggest that telling Ms. Brown to
23 keep breathing was somehow because she was
24 concerned that Ms. Brown would stop breathing. It
25 was more, as she would say to herself, to control

1 herself, to bring her -- to bring her heart rate
2 down, and all of the things that she herself did to
3 keep herself calm.

4 Mr. Shore did say, according to -- to
5 Ms. Gordon, I need help over here, at the end of
6 the seventh round but not in a loud voice. And I
7 would ask the Court when -- when it reads the
8 state's pleadings just to note again, we had
9 numerous conversations about whether this was
10 called out or whether it was said. And the state
11 can't resist just -- just writing it in a way that
12 is inconsistent with the facts that were adduced at
13 trial. Yelled, called out. That's not the
14 evidence that was adduced at trial.

15 Ms. Gordon testified she did not know --
16 now, she's sitting right next to Ms. Brown. She
17 did not know if Mr. Ray heard, and, in fact, thinks
18 he didn't because he closed the flap as he had done
19 in other rounds, that there was another round in
20 which he had used the exact words, did the exact
21 same thing.

22 And she testified that it would be
23 misleading to this jury to draw that link as if
24 that -- as if that -- that what Mr. Ray did was in
25 response to what Mr. Shore said. She said it would

1 be misleading.

2 THE COURT: Mr. Li, I'm sorry. You are
3 approaching an hour right now. And I'm going to
4 tell you 15 more minutes for your -- for your
5 oration.

6 MR. LI: Thank you, Your Honor.

7 THE COURT: So divide that however you wish,
8 and Ms. Polk will have an equal amount of time. I
9 really apologize for interrupting --

10 MR. LI: Understand.

11 THE COURT: -- but I think the briefing was
12 so, so thorough by both parties.

13 Please continue.

14 MR. LI: Thank you, Your Honor. I will.

15 Finally and critically for Ms. Brown's
16 case, this Court -- and it is the law of this
17 case -- has found previously that unresponsiveness
18 and apparent loss of consciousness are, quote,
19 unquote, not sufficiently similar to death to even
20 show relevance on the issue of knowledge for -- and
21 the conscious disregard of a substantial and
22 unjustifiable risk in the manslaughter case.

23 And that's in the Court's 404(b) ruling.
24 That's -- that's the law of the case. The Court
25 has found that those sorts of facts do not -- are

1 not sufficiently similar to -- to death to show
2 even relevance of knowledge.

3 I'm going to quickly move to Liz Neuman.
4 Liz Neuman was asked as late as the eighth round by
5 Laura Tucker, do you want to get out? She said,
6 no. She did not want to get out. That -- that
7 same conversation was confirmed by Laura Tucker.
8 Was also confirmed by Laurie Gennari. Nobody was
9 on notice that Ms. Neuman was at risk of death.

10 Mr. Shore. There is literally no
11 evidence at all that anybody could find that they
12 believed Mr. Shore was at risk of death. The
13 salient facts are the following: Dawn Gordon
14 testified that he helped Sidney Spencer out in the
15 sixth -- between the sixth and seventh round, and
16 then he came back in. And he sat next to Ms. Brown
17 and helped Ms. Gordon move Ms. Brown over. And
18 then he sat with his head on his -- on his arm and
19 talked to Ms. -- Ms. Brown throughout the eighth
20 ceremony -- eighth -- eighth round of the ceremony.

21 Nobody looking at those facts could
22 test -- did testify or could testify that they knew
23 he was about to die.

24 Your Honor, critically there are other
25 factors that must be proven, substantial and

1 unjustifiable risk of death. These are -- these
2 have to be -- death has to be probable. It can't
3 be like the civil liability. It's not just
4 unreasonable risk. It's got to be difference -- a
5 difference in kind. These are swinging a knife
6 with enough force to drive it into somebody's body
7 ten inches, shooting someone in the face, driving
8 drunk.

9 The state cites no authority for the
10 proposition that facts like these create a risk of
11 substantial and unjustifiable -- substantial and
12 unjustifiable risk.

13 Gross deviation. In order to find that
14 the deviation must be flagrant and extreme,
15 outrageous, heinous, grievous. That's the case
16 law. We have no facts like that in this case. Not
17 even close. The state has put together a melange
18 of information, but none of them rises to that
19 level, and the case law does not support it.

20 Now, finally Your Honor, I'm going to
21 talk quickly about causation. The first and
22 critical piece of causation is the concept of free
23 will. The -- the -- the state's theory that you
24 can condition somebody into surrendering their
25 freewill and doing things until -- until death

1 is -- is simply unsupported by the facts. You
2 know, the basic facts are what the Court has heard
3 and unsupported by the law.

4 There is no case anywhere that -- that
5 supports this case -- this -- this Court -- or this
6 state's theory. No case anywhere. And the state
7 completely misunderstands the First Amendment
8 argument, Your Honor.

9 It's simply this: Words can be
10 prosecuted. That's right. They can be.
11 Particularly words that incite people to do bad
12 things. For instance, harm themselves. Okay? But
13 in order to do that you've got to comply with --
14 with the Supreme Court's rulings, which are that
15 you -- it's got to be imminent. It's got to be
16 intended. The harm has to be intended. And it's
17 got to be likely. And the state hasn't made
18 those -- those showings.

19 And so this idea that by -- merely by
20 saying things, by encouraging people, you can do
21 it, by talking about death metaphorically, that
22 somehow that creates a liability, that's -- that's
23 prohibited by the First Amendment.

24 Your Honor, this is a -- you know --
25 extra -- so I've relegated -- you know -- three

1 minutes to it or one minute to it, it's an
2 extraordinarily important point and extraordinarily
3 important issue.

4 The Court has heard quite a bit of
5 evidence about toxins and about the -- the state's
6 own experts, own medical examiners' inability to
7 rule out toxins as a cause of death. We would
8 submit to -- to this Court that the records support
9 that exact finding. We would submit that the
10 Court -- to the Court that Dr. Lyon, for instance,
11 the medical examiner from two of the decedents,
12 said that he only had a 51 percent certainty behind
13 his diagnosis.

14 So when the state says that they've
15 proven beyond a reasonable doubt that -- that the
16 cause of death was heat stroke, that's just
17 incorrect and not supported by the record.

18 Your Honor, the bottom line is that
19 there -- the state has failed on all of those
20 factors.

21 One last point about negligent homicide.
22 And, Your Honor, to the extent that that's an issue
23 that we're dealing with today, I would ask for a
24 few minutes to deal with that. But right now the
25 only charged offense is reckless. If I could grab

1 three or four minutes, Your Honor?

2 THE COURT: You're at exactly an hour, Mr. Li,
3 and what I was going to do is give you ten
4 minutes --

5 MR. LI: Thank you.

6 THE COURT: -- for rebuttal.

7 And -- and then, Ms. Polk, you will have
8 70 minutes --

9 MR. LI: Thank you, Your Honor.

10 THE COURT: -- for your argument.

11 MR. LI: Thank you, Your Honor.

12 THE COURT: I'd like to go ahead and take the
13 recess now. We will be probably going into the
14 noon hour about a half hour or so. So let's recess
15 until 11:30.

16 And, Ms. Polk, we can resume at that time
17 with your argument. Thank you.

18 MR. LI: Thank you, Your Honor.

19 (Recess.)

20 THE COURT: The record will show the presence
21 of Mr. Ray and the attorneys.

22 Ms. Polk.

23 MS. POLK: Thank you, Your Honor. By my
24 calculation, the state has until 12:40?

25 THE COURT: That would be right.

1 MS. POLK: Thank you. Thank you, Judge.

2 Your Honor, in the short period of time
3 that the state had from last Friday until yesterday
4 at 2:00, we did our best to look at all the
5 arguments raised by the defense, to find and read
6 every case that they cited and to provide the Court
7 with the benefit of our hard work over the weekend
8 by putting as much as we found in our responding
9 brief.

10 I don't intend to cover all of those
11 arguments, but I would note that what we found are
12 some rather novel theories, in my opinion, on what
13 the criminal law is. And in several instances we
14 found that the defense cited cases in support of
15 propositions that those cases simply do not stand
16 for.

17 Just a couple of examples. First of all
18 is this issue of an omission and a duty to act
19 versus an act. The defense, I believe, wants the
20 Court to believe that a failure to stop engaging in
21 affirmative conduct is the same thing under the law
22 as an omission to perform a duty imposed by law.
23 And what they do is label Mr. Ray's conduct, the
24 defendant's conduct, as background acts to
25 omissions.

1 That is not what the statute says,
2 13-201, which provides that a minimum requirement
3 for criminal liability is the performance by a
4 person of conduct which includes a voluntary act or
5 the omission to perform a duty imposed by law,
6 which the person is physically capable of
7 performing.

8 Omitting to perform a duty imposed by law
9 is very different than stopping the conduct that
10 you are engaged in. In other words, stopping
11 affirmative conduct.

12 The state found a number of cases that I
13 believe are relevant to this case in a couple of
14 areas. And those are the cases dealing with
15 leaving children in hot cars. And then there's
16 also the -- the two Arizona cases, State versus
17 Marty and State versus Slover.

18 With respect to the proposition by the
19 defense that there's never been a prosecution of
20 people -- consensual behavior, people involved in
21 consensual behavior, certainly that's not true.
22 And the case that the defense cited for the
23 proposition that Russian roulette is not criminally
24 actionable behavior does not provide that at all.
25 And, in fact, that case specifically provides that

1 playing a game of Russian roulette can be
2 criminal -- a person can be held criminally liable
3 for that conduct.

4 I believe, Your Honor, that the cases
5 involving children left in hot cars are very, very
6 relevant to this case. And on this issue of
7 failing to stop engaging in affirmative conduct
8 versus the omission of a -- of a duty imposed by
9 law, in all of those cases involving children left
10 in hot cars, there are -- there's the act -- the
11 affirmative act of leaving the child in the hot
12 car. If you leave that child in the hot car for
13 five minutes, it's not -- it's probably not going
14 to be a crime. Ten minutes the child is probably
15 not going to die. When you leave the child in the
16 car for four hours, as in the case -- in the Kolzow
17 case, the child dies, and there's the crime.

18 Those cases don't talk about this as an
19 omission. They recognize that there is conduct
20 there. You leave the child in the car, and then as
21 the hours go by because of the heat, the child
22 dies. Those cases do not analyze the subsequent
23 manslaughter charges in the context of a duty or an
24 omission. They analyze it in the context of
25 affirmative conduct.

1 And that's what we have here, is Mr. Ray
2 placing the participants and the victims in a
3 heated environment, affirmatively engaging in
4 conduct. And that affirmative conduct involves
5 some failures, some failures to take the
6 opportunity, when he learns that people are in
7 distress, to stop the ceremony, tend to them
8 immediately, and to get them out.

9 Your Honor, the state does -- we will
10 respond later in our argument on this issue of
11 duty. And I would ask for the Court's permission
12 that Mr. Hughes be allowed to handle that portion
13 of the argument. And what I'd like to do is make
14 my arguments and at the end of -- within our
15 reserved time allow Mr. Hughes to come up here to
16 specifically address the duties that we believe
17 exist.

18 THE COURT: I follow that procedure in this
19 case.

20 MS. POLK: Your Honor, I'm not going to spend
21 much time or any time rather than at this very
22 moment on this First Amendment issue. What we
23 found there, again, are a lot of cases that we
24 believe simply to be inapplicable.

25 We agree that the First Amendment

1 prohibits the criminalizing of speech when the
2 speech itself forms the corpus of the crime. That
3 is not what this case is about. And what the
4 defendant failed to cite in their motion is the
5 Wisconsin versus Mitchell case that clearly stands
6 for the proposition that the First Amendment does
7 not prohibit the evidentiary use of speech to prove
8 motive or intent and that defendants' statements
9 are commonly admitted in criminal trials.

10 Those are just a few just overview of
11 responding to some of the issues just raised by
12 Mr. Ray. What I'd like to do with my time is go
13 back to the basics, talk about what the law is,
14 what the elements of manslaughter are, what the
15 standard for a Rule 20 is, and what the defendant's
16 conduct was and how his conduct clearly fits within
17 the elements of the crime.

18 Just quickly I want to review with the
19 Court -- and I know the Court knows it. But what
20 is the standard on a Rule 20? For a Rule 20 the
21 trial court must consider all of the evidence
22 presented in the light most favorable to the state
23 and must draw all reasonable inferences against the
24 defendant. That's the State versus Clifton case
25 that we cited in our response.

1 In a Rule 20 if the Court finds that
2 reasonable persons may fairly differ as to whether
3 certain evidence establishes a fact in issue, then
4 such evidence must be considered by the trial court
5 as substantial. And that's the Tyson case.

6 And the trial judge must give full
7 credence to the right of the jury to determine
8 credibility to weigh the evidence and to draw the
9 justifiable conclusions therefrom.

10 And then, finally, the test under Rule 20
11 is whether any rational trier of fact could have
12 found the essentially elements of the crime proven
13 behind a reasonable -- beyond a reasonable doubt.

14 To prove manslaughter -- and, Your Honor,
15 Mr. Ray at the very end said he wasn't going to
16 address the issue of negligent homicide. And I
17 would just note for the Court that pursuant to
18 Rule 13, negligent homicide is necessarily included
19 and charged as a lesser offense. And all of the
20 arguments I'm making obviously would go to the
21 lesser included of negligent homicide as well.

22 I don't intend to specifically address
23 negligent homicide. But as we put forth in our
24 response, we would like the Court to consider all
25 the evidence with respect to negligent homicide as

1 well.

2 To return verdicts of manslaughter, the
3 jury must find beyond a reasonable doubt that,
4 first of all, the defendant caused the deaths of
5 Kirby Brown, James Shore, and Liz Neuman; that his
6 conduct posed a substantial and unjustifiable risk
7 of death; that the defendant was aware and
8 consciously disregarded the risk that his conduct
9 posed, and that his disregard of the risk was a
10 gross deviation from the standard of conduct that a
11 reasonable person would observe in that situation.

12 As the role of a Rule 20 is to test the
13 sufficiency of the evidence, that's where I want to
14 spend the bulk of my time. The state has to prove
15 that Mr. Ray caused the deaths of the three
16 victims. And the evidence in this case proves
17 beyond a reasonable doubt that it is Mr. Ray's
18 conduct that proves -- that -- that killed the --
19 that caused the death of the three victims.

20 His heat-endurance challenge, his version
21 of a sweat lodge ceremony, came at the end of a
22 five-day event for which he charged participants
23 approximately \$10,000. It consisted of crowding
24 about 56 people together in the enclosed, tight,
25 super-heated space for more than two hours.

1 The defendant prepared the participants
2 all week long for this heat event. By his own
3 admission his conduct and the activities of week
4 were intended to and did, in fact, wear
5 participants down, in his words, to get them less
6 grounded in order that they could have an altered
7 experience.

8 The defendant promised them they would
9 have threshold experiences that would be
10 uncomfortable but told them they were necessary in
11 order to grow in capacity. And he promised them
12 that his event would leave them changed people.

13 This court heard uncontested testimony
14 about the specific events of the week and testimony
15 from witnesses who described the effects of those
16 events, the events of the five days preceding the
17 sweat lodge, on their state of mind as they
18 participated in his heat-endurance challenge.

19 Uncontested trial testimony established
20 that for most participants the events -- the sweat
21 lodge in particular, and many of the events of the
22 week, were a surprise. Several witnesses testified
23 that when a participant did not play full, they
24 were chastised. And many witnesses testified how
25 they were tired, hungry, exhausted, mentally weak,

1 and fully conditioned to follow the defendant's
2 words by the time they entered the sweat lodge.

3 The head shaving event, in which both
4 Kirby Brown and James Shore participated, was
5 symbolic of playing full on. And those words
6 became important, as witnesses have testified,
7 throughout the week. The code of silence and the
8 Samurai Game taught participants and the victims to
9 obey the defendant and that there are consequences
10 for your teammates if you do not.

11 The Vision Quest, 36 hours without food
12 and water, restrictions on movement, and
13 confinement to a small circle, reinforced absolute
14 obedience to the defendant in order to get the most
15 from the event. It also weakened the physical
16 state of the participants as they endured his heat
17 event.

18 The defendant emphasized all week that
19 participants should allow others to have their own
20 experience, to let them have their own journey, and
21 to ignore their natural instinct to come to the aid
22 of somebody who might be in distress.

23 The audio of the presweat lodge briefing
24 is compelling evidence of the defendant's culpable
25 mental state of recklessness. It is uncontroverted

1 evidence that the defendant knew participants would
 2 not rely on their own instinct as to the potential
 3 serious harm to themselves or others. And it is
 4 compelling evidence that the defendant was
 5 consciously disregarding a substantial and
 6 unjustifiable risk that the persons being exposed
 7 to the intense heat and the potentially fatal
 8 conditions would ignore their own physical
 9 symptoms, and they did, in reliance on the
 10 defendant's assurances that they would be okay.

11 The jury -- jurors heard from the audio
 12 the following, that the sweat lodge was, quote, a
 13 way to prove to yourself and to prove to the
 14 universe that you're willing to do whatever it
 15 takes to truly accomplish the intention you've set
 16 as most important to you.

17 The jurors heard Mr. Ray's own words when
 18 he said, when you have faced your own death, you
 19 stared it in the eyes and you've overcome it, then
 20 life is never the same. It's really not. He --
 21 they heard his instructions that you've got to
 22 just -- you've got to surrender to it and you've
 23 got to get into the sacred space.

24 They heard his words, quote, if you
 25 choose to play full on, which I'm going to

1 challenge you to do, you're going to have one of
 2 the most intense altered states you've ever had in
 3 your entire life and may ever have in your entire
 4 life.

5 They heard him say, quote, you can do
 6 this. You can do this regardless of whether you
 7 think you can. We've been doing this for years.
 8 You can do this. It is a matter of whether or not
 9 you will.

10 And they heard him promise, quote, you
 11 will feel as if you're going to die. I guarantee
 12 that. But you see, the true Spiritual Warrior has
 13 conquered death and, therefore, has no fear and no
 14 enemies in this lifetime or the next because the
 15 greatest fear that you'll ever experience is the
 16 fear of what? Death. You will have to get to a
 17 point where you surrender and it's okay to die.

18 The jurors heard Mr. Ray's own words when
 19 he told his participants in that presweat lodge
 20 briefing, and so you cannot leave during a round.
 21 And then they heard him tell the participants,
 22 quote, that means you don't talk over me, you don't
 23 say anything unless you're asked to say anything.

24 All of that, in addition to the events of
 25 the week, is relevant, as the Court had noted, to

1 the state of mind of participants and victims as
 2 they then went into this heat-endurance challenge.
 3 And while many participants who were conscious and
 4 able to move were arguably free to leave the tent
 5 between rounds, many participants testified they
 6 were unable to do so by reason of their altered
 7 mental status, which is the hallmark of heat
 8 stroke, including unconscious.

9 Some witnesses testified they felt
 10 obligated or bullied to stay in as the result of
 11 the events of week that preceded -- preceded this
 12 challenge. Others testified they were influenced
 13 by their financial investment of \$10,000 to stay in
 14 the super-heated environment in hopes of achieving
 15 the breakthrough marketed to them by the defendant.

16 All the participants testified they
 17 trusted the defendant's assurances that they could
 18 make it through all the rounds and that it was safe
 19 to ignore their body's signs of distress. And at
 20 least one participant, Dawn Gordon, testified she
 21 understood the sweat lodge events could cause death
 22 but that she trusted the defendant and that he
 23 would keep her and others safe. Many testified
 24 they were in an altered mental status, not thinking
 25 clearly, that they were weak, hot, and ultimately

1 in a self-survival mode.

2 It is uncontested, Your Honor, that the
 3 defendant controlled every single aspect of that
 4 heat event. He chose to hold it in the sweat lodge
 5 at Angel Valley knowing that he had held it there
 6 in 19 -- in 2008 and the problems he had had then
 7 in the same structure, knowing that he had held it
 8 in a similar structure at Angel Valley in 2007 and
 9 the problems that he had had there.

10 It's uncontested that the defendant
 11 controlled the number of rounds. It's uncontested
 12 that he controlled the length of the round. It's
 13 uncontested that he controlled the entire length of
 14 the event. It's uncontested that he controlled the
 15 heat inside the tent by controlling the number of
 16 rocks brought in for each round. It's uncontested
 17 that he controlled the hot steam inside the tent by
 18 the amount of water he poured on the rocks for each
 19 round. It's uncontested that he controlled how
 20 much heat would escape and how much fresh air could
 21 enter the tent by controlling how long the flap was
 22 open in between each round. And it's uncontested
 23 that he controlled when the flap would open and
 24 when it would close.

25 He controlled when participants could

1 leave, only between rounds. And it is uncontested,
2 essentially, that the defendant controlled all
3 aspects of everything that occurred and that the
4 defendant intended for everything to occur except
5 for death.

6 It's also uncontested, Your Honor, that
7 the defendant knew that the participants were in
8 distress. Several witness, as the Court knows,
9 testified that they called out or heard others call
10 out with concern for the well-being of both Kirby
11 Brown and Liz Neuman. Several witnesses testified
12 that they heard the defendant respond to both
13 situations acknowledging their statements of
14 concern.

15 And in spite of this knowledge and the
16 defendant's knowledge of the growing distress of
17 many participants, as the rounds progressed the
18 defendant did not check up on the participants or
19 stop the event and instead continued to create the
20 deadly heat, continued to create more deadly heat
21 by bringing in more heated rocks, more water, and
22 creating more boiling steam in the already
23 super-heated environment.

24 Apparently alarmed at the large number of
25 stones that were being called for by the defendant

1 before the fifth round, according to the testimony
2 of Sean Ronan, Megan Fredrickson, the defendant's
3 employee, warned him, quote, James, these people
4 are your responsibility.

5 And nonetheless, and aware that
6 participants had passed out inside the sweat lodge
7 and aware that participants laid there unconscious,
8 the defendant continued to act. He continued to
9 introduce more heat, more water, and more steam.
10 He continued to exhort participants to stay in, to
11 ignore their body's sign of impending heat illness
12 and continued to say, as people left or as people
13 thought about leaving, you are more than that. You
14 are more than your body.

15 I want to address the issue of causation,
16 Your Honor, because the state has proven beyond a
17 reasonable doubt that the defendant's conduct
18 caused the death of the three victims.

19 Some basic legal precept about causation.
20 First of all, the state has to prove legal
21 causation, cause in fact, and proximate cause both.
22 We have to prove, and we have proven, that but for
23 Mr. Ray's conduct the resulting deaths would not
24 have occurred. We have to prove, and we have
25 proven, the proximate cause that in the natural and

1 continuous sequence of events that the deaths would
2 have occurred, produces the death, and without
3 which the deaths would not have occurred. In other
4 words, without Mr. Ray's conduct, the deaths would
5 not have occurred.

6 Proximate cause requires that the
7 difference between the result intended by the
8 defendant and the harm actually suffered by the
9 victims is not so extraordinary that it would be
10 unfair to hold the defendant responsible. The
11 Court heard testimony from witnesses that the
12 defendant intended for them to suffer altered
13 mental status and including unconsciousness when he
14 told them you might pass out, but that's okay,
15 we'll drag you out.

16 The proximate cause does not exist if the
17 chain of natural events and cause either is broken
18 by a superseding inter -- intervening event that
19 has to be both unforeseeable by the defendant and
20 without the benefit of hindsight may be described
21 as abnormal or extraordinary.

22 An intervening event is not a superseding
23 event interrupting causation if the defendant's
24 negligence creates the very risk of harm that
25 causes the injury, which is certainly true in this

1 case. And an intervening event is not a
2 superseding cause interrupting the defendant's
3 responsibility when the defendant's conduct
4 increases the foreseeable risk of a particular harm
5 occurring through a second actor.

6 In this case the jury heard a lot of
7 medical testimony. They heard from the state's
8 expert, Dr. Dickson, who testified that he had
9 reviewed all of the work done by the other doctors,
10 all of the law enforcements reports, and that he
11 had examined all other possible causes of death,
12 such as toxins or organophosphates. And he
13 testified unequivocally that the victims died of
14 heat stroke or as a result of heat stroke.

15 Dr. Dickson testified that, yes, if you
16 look at some of the signs and symptoms in
17 isolation, you can make them fit into lots of other
18 toxidromes. But Dr. Dickson testified when you
19 look at all of the medical information together,
20 you look at all the signs and symptoms not in
21 isolation, as the defense wants the jury to do, but
22 look at them all together, that it is a clear case
23 of heat stroke.

24 All of the state's medical experts
25 testified to a medical degree of certainty that the

1 victims died as a result of exposure to the heat.
 2 Some doctors testified that they could not
 3 hypothetically rule out organophosphates due to
 4 overlapping symptoms. But Dr. Dickson, who's the
 5 only doctor who ever treated organophosphate
 6 poisoning, testified he would not even
 7 hypothetically allow that this was a case of
 8 organophosphate death.

9 The doctors testified that health-related
 10 injuries occur on a continuum, from heat exhaustion
 11 at the early stage to heat stroke at the later
 12 stage. Symptoms of heat illness include everything
 13 that witnesses have testified to and that the
 14 medical records have shown us -- muscle cramps,
 15 nausea, vomiting, weakness, and the hallmark of
 16 heat stroke, the altered mental status.

17 Dr. Dickson testified that the
 18 demarcation between heat exhaustion at the early
 19 end and heat stroke at the other end is that
 20 altered mental status, and that once you move into
 21 heat stroke, the death is imminent if you do not
 22 immediately remove yourself from that heated
 23 environment and cool down.

24 Dr. Dickson testified that heat stroke is
 25 a clinical diagnosis, but there's not a test. And

1 that dehydration is not a necessary component of
 2 heat stroke and that temperature is not a necessary
 3 component because in most instances you cannot get
 4 a good temperature of a victim of heat stroke.

5 Dr. Dickson, again, the only doctor who
 6 has treated patients with organophosphate
 7 poisoning, testified that while the symptoms of
 8 heat stroke may overlap with symptoms of
 9 organophosphate poisoning, that the two illnesses
 10 are never mistaken, that death due to
 11 organophosphate poisoning occurs when the patient
 12 drowns due to excess saliva.

13 In this case there is ample testimony
 14 that the witnesses who fell ill lay on their backs
 15 during the event, some of the witnesses. They did
 16 not drown in their own saliva. The testimony has
 17 been that the three patients who passed away and
 18 other patients who were strapped to gurneys were
 19 strapped on their backs to the gurneys. They did
 20 not drown in excess saliva.

21 And not a single patient -- through all
 22 of the medical records that we have, there's not
 23 indication that a single patient drowned due to
 24 excess saliva, which would be the indication of
 25 death due to organophosphate poisoning.

1 The Court heard testimony from the
 2 Hamiltons that they have a chemical-free policy at
 3 their property. And, in fact, the state through
 4 the witnesses has -- has proven beyond a reasonable
 5 doubt that there were no chemicals containing
 6 organophosphates even -- even used at Angel Valley.
 7 There's simply no evidence of any unknown toxin on
 8 the property at all -- pressure-treated wood,
 9 pesticides, rat poisoning -- which would cause a
 10 person to bleed to death, by the way. And there's
 11 no evidence of that -- and certainly no evidence of
 12 organophosphate poisoning.

13 And finally, Your Honor, on the issue of
 14 causation, we have what we have described as the
 15 pattern that when it's the defendant who's
 16 conducting the event, people get sick. When it's
 17 somebody else conducting the sweat lodge in that
 18 same structure at Angel Valley, nobody gets sick.

19 When it's the defendant who is conducting
 20 the ceremony in 2008 and 2009 in the same
 21 structure -- the same structure, the same blankets,
 22 the same coverings, people get sick. In 2007 when
 23 the defendant conducted his events there in a
 24 different frame for the sweat lodge and -- and
 25 similar blankets and some of the same blankets,

1 people still get sick. That pattern is -- is
 2 relevant, as the Court had noted, to the issue of
 3 causation.

4 I want to move on now, Your Honor, to the
 5 elements the state must -- must prove, which is
 6 that Mr. Ray consciously disregarded a substantial
 7 and unjustifiable risk of death. And this,
 8 Your Honor, is where I find the cases dealing with
 9 children left in cars so relevant. To show that
 10 the defendant was aware that his conduct posed a
 11 substantial and unjustifiable risk of death and
 12 that he consciously disregarded the risk, the cases
 13 allow that criminal intent to be shown by
 14 circumstantial evidence.

15 And quoting from the State versus
 16 Routhier case, which is noted in the William case,
 17 both noted in our brief, the Court stated, quote,
 18 criminal intent being a state of mind is shown by
 19 circumstantial evidence. Defendant's conduct and
 20 comments are evidence of his state of mind.

21 We cited in our response, Your Honor, the
 22 Kolzow case, which is a case out of Illinois where
 23 the defendant left her three-month-old child inside
 24 her locked car for four hours and was found guilty
 25 of manslaughter. I noted for the Court in our

1 brief that the definition under the Illinois
2 Criminal Code is almost identical to the definition
3 under the Arizona Criminal Code of "reckless." And
4 for that reason, what the Court said in the Kolzow
5 case is very -- very relevant.

6 On appeal the defendant had asserted that
7 the evidence failed to prove that she acted
8 recklessly by leaving her car -- her child
9 unattended in the car resulting in the death. And
10 what she argued on appeal was that there was no
11 evidence that she knew that the car would become so
12 overheated that it would present a danger to her
13 baby.

14 And what the Court stated at page 429 is
15 that, quote, we believe a reasonable person would
16 be aware of the risk in leaving a three-month-old
17 infant unattended in a parked car for four hours on
18 a summer day and find the evidence supports the
19 trial court's finding that the -- the defendant
20 acted recklessly by consciously disregarding that
21 clear and obvious risk.

22 We also cited for the Court a case out of
23 Michigan, the People versus Maynor court, which
24 involves a defendant who left her two small
25 children in a hot car for about three and a half

1 hours. In that case the Court actually went a step
2 further. In that case the Court concluded that the
3 defendant had specifically intended to seriously
4 harm her children.

5 In a footnote, the Court stated the
6 following, again, which I find very relevant in
7 this case. Quote -- and this was in response to
8 the defendant's assertion that she did not realize
9 that leaving children in a heated environment, the
10 hot car, could cause death. Quote, it is
11 questionable whether her claim of ignorance is even
12 sufficient to defeat the rather obvious fact that
13 hot weather makes cars very hot.

14 The prosecution compellingly argued below
15 that people know not to leave milk in their cars on
16 hot days. Indeed, every new driver quickly learns
17 that on hot days the temperatures inside a car will
18 exceed the outside temperatures in a relatively
19 short period.

20 And here's where I think these words are
21 so important, Your Honor. In other words, it does
22 not require a scientific background to know that
23 cars get very hot on summer days, nor is extensive
24 medical knowledge required to realize that such
25 temperatures are harmful to people, especially

1 children.

2 We cited, Your Honor, the Lovejoy versus
3 Arpaio case, which is an Arizona case that ended up
4 in the Federal District Court. And in that case
5 the Court, first of all, stated -- examined the
6 mental state of reckless, which was necessary to
7 find that the defendant had recklessly caused the
8 death of his dog. And the Court in that case
9 stated that a person's mental state is generally
10 ascertained by inference from all the relevant
11 surrounding circumstances.

12 In other words, we get to look at all the
13 surrounding circumstances to infer the defendant's
14 mental state of recklessness. And what I like
15 about the Lovejoy case is that the Court examined
16 the cases I've just talked about, examined those --
17 those cases involving leaving children in the hot
18 cars, and came up with an analysis that consists of
19 four factors that they found to be present to
20 determine whether or not somebody acts recklessly
21 in leaving a child or a dog in a heated
22 environment.

23 I call them, Your Honor, the "Lovejoy
24 factors" because I think they are very useful to
25 this Court in determining the issue of the

1 defendant's culpable mental state. In the Lovejoy
2 versus Arpaio case, this is what the Court found.
3 The first factor to prove whether or not a
4 defendant's conduct is reckless in leaving children
5 or dogs in hot environments is whether the
6 defendant willfully and intentionally created the
7 condition that led to the victims being placed at a
8 risk of death. Actually, that's the second factor.
9 That's a factor that I think is -- is relevant
10 here.

11 In the cases involving leaving children
12 in hot cars, the Court looks at whether the
13 defendant willfully and intentionally created the
14 conditions that lead to the victims being placed at
15 a risk of death. I find it very noteworthy, Your
16 Honor, that in all of the cases involving leaving
17 children in hot cars or the dog in a hot car,
18 there's no evidence that any of them intentionally
19 placed the children in a hot environment so that
20 the children or the dog would suffer the
21 consequences of heat.

22 Those are all cases where without
23 question the parent intends to leave the child in
24 the car or, in some of the cases, forgets that the
25 children are in the car. None of those involve

1 what we have here, which is a complete step
2 further.

3 This is not a -- a case about Mr. Ray not
4 knowing that he was placing people in a
5 super-heated environment or somehow forgetting that
6 he had participants in heated environments. This
7 is a case that goes much, much further than all of
8 the cases where reckless manslaughter is found
9 against a parent or guardian or a person who leaves
10 a child in a hot car. Because what Mr. Ray has
11 done in this case is intentionally placed them in a
12 heated environment and intentionally induced and
13 used heat to take them up to the edge of death,
14 intentionally used heat to create what he perceives
15 as a good thing, the altered mental status, which
16 is actually the hallmark of heat stroke leading to
17 death.

18 So these cases go -- the cases finding
19 reckless manslaughter, in other words, require a
20 much lower level of culpable mental state of the
21 defendant in order to find him guilty of
22 manslaughter. In this case we have that at a
23 minimum. We have Mr. Ray placing them in a heated
24 environment. But in this case we have Mr. Ray
25 going much, much further, which is intentionally

1 introducing more and more heat, intentionally
2 creating that heated environment, intentionally
3 inducing the altered mental status because that was
4 his goal.

5 If courts in cases involving children
6 left in hot cars can find that there's enough
7 evidence there to, first of all, cause -- find
8 causation, but most important to find that the --
9 the defendants in those cases acted recklessly,
10 then at a minimum this jury has enough
11 information -- enough testimony and enough evidence
12 to find beyond a reasonable doubt that the -- that
13 Mr. Ray acted recklessly.

14 The second -- the third Lovejoy factor is
15 that -- let me just back up, Your Honor. Four
16 factors in Lovejoy. The first one I don't believe
17 applies here. The first one was whether there's
18 evidence that the children had been previously
19 neglected or were unwanted. I don't think that
20 even is applicable here.

21 The other three factors are here:
22 Whether there was evidence the defendant willfully
23 created the conditions that led to the children
24 being placed at risk of serious harm. We know that
25 that's a factor here. We know he intentionally

1 placed them in a heated environment and that he
2 intentionally continued to introduce more heat.

3 The third Lovejoy factor is was there
4 reason to believe the parent had merely forgotten
5 their children in the hot car? And, again, in this
6 case we know that that's not the case.

7 And then the fourth factor are cases
8 involving very young children wherein the adults
9 caring for them were expected to be vigilant as to
10 their well-being and whereabouts. I think that
11 factor is very -- is relevant and present in this
12 case. We're not dealing with young children, but
13 the Court knows that the testimony has been that
14 people were rendered into an altered mental state
15 and that the three victims were unconscious.

16 Surely if a young child can -- if
17 defendants can be expected to have a heightened
18 level of vigilance for young children in their
19 care, the same applies here, that when you
20 intentionally cause somebody to suffer an altered
21 mental status, you have to take care of them and
22 you know that they cannot take care of themselves.

23 To suggest, as the defense has done
24 throughout this case, that somehow the victims who
25 are in trouble, who are unconscious, and according

1 to some of the testimony, not breathing -- to
2 suggest somehow that they had the capacity or the
3 free will to get themselves out is just not
4 supported by the evidence.

5 The evidence in this case, both the
6 circumstantial and the direct evidence, has
7 conclusively proven that the defendant was aware of
8 the obvious risks in conducting a heat-endurance
9 challenge and that the risk in leaving participants
10 who were in altered -- in an altered state of
11 consciousness in the heated, compromised
12 environment, that he acted recklessly in
13 disregarding that risk.

14 I want to just go through a few of the
15 factors including the waiver that is -- constitutes
16 direct evidence and circumstantial evidence that
17 Mr. Ray was aware of the risks of his heat event.
18 Mr. Li suggested that it is black letter law that a
19 waiver can eliminate the duty of care. It is also
20 black letter law that a person cannot obtain a
21 waiver and thereby exonerate himself from criminal
22 responsibility for his conduct.

23 The waiver that the defendant in this
24 case required all participants to sign released --
25 purports to release the defendant and his company

1 of liability for the defendant's acts resulting in
2 death. And that is evidence that the defendant
3 knew of the substantial and unjustifiable risk of
4 his conduct.

5 The waiver, and I quote, warned
6 participants, quote, a sweat lodge ceremony -- that
7 this was a sweat lodge ceremony, a ceremonial
8 sauna, involving tight, enclosed spaces and intense
9 temperatures. The waiver informed participants,
10 quote, there are inherent risks in the activity.
11 The waiver warned participants there is a risk I
12 may receive injuries requiring medical attention.
13 The waiver warned participants that people, quote,
14 may have been seriously injured by participating in
15 the activities. And the waiver warned participants
16 that, quote, they might suffer physical, emotional,
17 financial, and other injury during any of the
18 activities and there is and can be no assurance or
19 guarantee regarding my health or safety in
20 connection with my participation in the activity.

21 In addition to all the other evidence
22 that the jury has heard, that waiver is additional
23 evidence that the defendant knew that his conduct
24 created a risk of death.

25 I want to cover some of the evidence that

1 the jury has heard about the defendant's actual
2 knowledge that people were in distress. It's been
3 a lengthy trial. I know that the Court has heard
4 all of the testimony that the jury has heard and
5 has paid close attention. But I think for purposes
6 of a Rule 20, which is where we test the
7 sufficiency of the evidence, it's important that I
8 highlight some of the testimony that the jury heard
9 because it goes directly to the defendant's
10 knowledge that people were in distress and it goes
11 directly to proving that he consciously disregarded
12 the substantial and unjustifiable risk that his
13 conduct inside that sweat lodge created. And
14 that's the risk of death.

15 First of all, during this heat-endurance
16 challenge, many people fell ill and were dragged
17 out right in front of the defendant between rounds
18 and, arguably, in the case of Lou Caci, during a
19 round. By round 4 of the defendant's event, which
20 is the normal length of a sweat lodge ceremony
21 conducted by a reasonable person -- and I'll
22 address that in a few minutes. But by round 4
23 there was growing chaos and distress in that tent.

24 By round 6 Debbie Mercer testified, as
25 did many participants testified, about Dennis

1 Mehravar, who was screaming that he was having a
2 heart attack. Witnesses, including Ms. Mercer,
3 testified the defendant yelled out, who is yelling,
4 and that participants told it -- told him it was
5 Dennis Mehravar.

6 Ms. Mercer testified that she then heard
7 the defendant call out Mr. Mehravar by name and
8 say, it's fine. It's a good day to die. Just go
9 with it. Mercer testified that out loud she said,
10 it's a good day to live. And as the Court knows,
11 Debbie Mercer testified that she dragged out ten
12 people during this heat-endurance challenge right
13 in front of the defendant, who remained at his
14 position at the door never once stopping to check
15 on the people, check on their condition, or stop
16 the event itself as the chaos grew and as more and
17 more people fell into physical and medical
18 distress.

19 Dennis Mehravar himself testified about
20 that same event. He testified how there was no
21 fresh air where he sat, even when the flap opened.
22 And, of course, his spot in the tent was in the
23 same place -- in the -- in the same area as many of
24 the -- as two of the three victims in this case.

25 What I find interesting, Your Honor, is

1 the argument that if other participants didn't stop
2 to take care of those in distress, then how could
3 we expect Mr. Ray to? That, of course, ignores
4 who's in charge of the event. It ignores who is at
5 the flap getting fresh air between rounds. It
6 ignores the conditioning that Mr. Ray himself has
7 undergone having done these sweat lodge events
8 before. It ignores the fact that while two of the
9 three victims were on the Vision Quest without food
10 or water for 36 hours, Mr. Ray was not. And it
11 ignores the fact that the events of the entire week
12 are about Mr. Ray being in charge and listening to
13 his instructions, including the presweat lodge
14 briefing where he told them you will not talk and I
15 am the one who is conducting and talking.

16 What's interesting, though, about
17 Mr. Mehravar's testimony is that he was questioned
18 on cross-examination about whether he would save
19 someone who was dying. And his testimony was that
20 if it was a normal day and someone is hurt, of
21 course, I would help. But in that tent I was in
22 pain. I don't know if I could. He was pressed
23 during cross-examination, and he was asked
24 specifically, well, what about if the person right
25 next to you is dying? Wouldn't you stop the

1 ceremony and save them? And Dennis Mehravar
2 testified, I probably would wait until the round
3 was over and ask for help. I wouldn't have stopped
4 the ceremony.

5 Several witnesses testified along the
6 same lines, that they were -- first of all, didn't
7 feel that they could interrupt Mr. Ray, that he was
8 clearly in charge, that you don't interrupt
9 Mr. Ray, and that this was his event. They didn't
10 know what was normal. And because of that briefing
11 where he had told them, you're going to feel like
12 you're going to die, you're going to pass out,
13 ignore that and push through, none of them were in
14 a position to recognize that what was going on
15 around them could lead to death.

16 The one person who was in a position to
17 recognize, who did recognize, actually intended for
18 the participants to be experiencing that altered
19 mental state, including a state of unconsciousness.
20 That was the goal of his event using the heat.

21 When the event was over, I think it's
22 very telling, Mr. Mehravar's testimony, again, that
23 when it was over, and this is when all the chaos is
24 surrounding them, Mr. Mehravar testified he said to
25 the defendant, James, I think I died and that the

1 defendant smiled back and said to Dennis Mehravar,
2 you were reborn. Go take a shower and get cleaned
3 up.

4 That's very relevant on this issue of the
5 defendant's knowledge, as well as his conscious
6 disregard to show the Court and the jury that that
7 is what the defendant intended. He wanted to take
8 people to the edge of death, to have this
9 near-death experience, because he perceived that
10 somehow as a good thing. And that is, by the way,
11 what he had marketed.

12 Ted Mercer testified on the subject of
13 Dennis Mehravar that when Dennis was screaming, I
14 don't want to die, he heard the defendant respond
15 by telling Dennis he was more than his body and he
16 was not going to die.

17 Dr. Beverly Bunn testified that around
18 round 6 that's when everything started going crazy.
19 She believes that's when Sidney Spencer was dragged
20 out completely lifeless, according to her
21 testimony, right passed the defendant. And the
22 defendant shouted out to everyone, quiet down. I'm
23 in charge. No one is to talk.

24 Scott Barratt had testified that he left
25 the tent at round 4 and crawled back in for round 6

1 and that the first thing he noticed was a large
2 woman in his path, a person the testimony suggests
3 is Linda Andresano, that the defendant was telling
4 somebody to move Linda, who was passed out. So the
5 testimony is that Mr. Ray was saying, move this
6 person who is passed out. But the person couldn't
7 because Linda was on that person's leg.

8 When -- Scott testified that when he
9 tried to move Linda away from the pit and the
10 heat -- and, again, this is when the flap is open
11 and when people can see. When Scott tries to move
12 Linda, who is passed out, away from the pit, the
13 defendant yells at him to stop. Scott then
14 testified he thought he would lay in front of her
15 between the pit and her. He was thinking of
16 protecting her from the heat. But again -- oh, but
17 he was afraid the defendant would yell at him. And
18 he testified that the defendant knew Linda was
19 unconscious.

20 This is the beginning of round 6. The
21 defendant knew that Linda Andresano was
22 unconscious, and he said, just leave her. We need
23 to keep on going. Linda, of course, was dragged
24 out after the ceremony was over and did fortunately
25 recover.

1 Mike Olesen testified that he left the
2 tent after the fifth round and returned for the
3 final round. Mr. Olesen testified that as he made
4 his way in to find a place to sit, a participant
5 named Christina was in his path babbling and
6 holding on to her pouch. Olesen testified that the
7 defendant yelled at him to get out of the way and
8 to let the lady get back to her seat.

9 Mike Olesen testified that he next tried
10 to help a lady who was passed out and leaning up
11 against the side of the tent. When Olesen tried to
12 make her lie down without success, he asked for
13 help but found that everyone around him was already
14 out of it. This is the final round. The defendant
15 told Olesen to leave the woman alone, that she
16 would be fine. Again, another woman who was passed
17 out leaning against the side of the tent and the
18 defendant says, leave her alone. She will be fine.
19 We need to continue with the ceremony.

20 Mr. Olesen is another one who was
21 cross-examined by the defense to say, well, if you
22 thought it was so bad, why didn't you stop the
23 ceremony? And Mr. Olesen, like other participants,
24 replied to the question on cross-examination that
25 he didn't feel like he could interrupt Mr. Ray.

1 I outlined, Your Honor, quite a bit of
2 information summarizing the testimony of several
3 witnesses with respect specifically to Liz Neuman
4 and to Kirby Brown and James Shore and the
5 information that the jury has heard that would
6 prove to them beyond a reasonable doubt that the
7 defendant was aware and consciously disregarded
8 that his -- the risk of his conduct, that it would
9 create death. I just want to briefly cover some of
10 that.

11 I know that the Court remembers the
12 testimony of Laura Tucker and the conduct that she
13 observed in Liz Neuman that caused her concern and
14 caused her enough concern to call out even though,
15 as the Court has heard in the briefing, that
16 participants were told that they were not supposed
17 to talk.

18 Ms. Tucker testified that around the
19 fourth or fifth round, Liz unexpectedly left
20 Tucker's side and moved closer to the pit of hot
21 rocks, eventually coming to rest on Tucker's legs.
22 When Ms. Tucker tried to get Liz to come back, Liz
23 brushed her hand away. And Tucker, so concerned
24 about Liz's condition, called out to defendant and
25 called him by name. James, it's Laura. I'm

1 concerned about Liz.

2 Ms. Tucker testified that the defendant
3 did not investigate the situation, did not come
4 check up on Liz, did not ask any other staff
5 members to check up on Liz but instead proclaimed
6 from his spot by the door that Liz has done this
7 before and she knows what she's doing. That's in
8 spite of his knowledge that his event creates
9 altered states of mental status, in spite of his
10 knowledge that his event causes people to pass out,
11 he simply proclaimed from the door, telling Liz
12 herself, who at that point is conscious, and
13 certainly telling the people around Liz, who at
14 that point were trying to look out for her, that
15 she is fine.

16 With that information in mind, Liz having
17 heard it herself, when Laura -- when Ms. Tucker
18 touches Liz's left shoulder and asks Liz if she's
19 all right, she responds in a voice that was
20 labored, according to Ms. Tucker, and according to
21 Laurie Gennari, sounded slurred and a bit like
22 somebody who was drunk, but she responds yes.

23 And when Ms. Tucker asks Liz if she
24 needed to get out, again, Liz having heard Mr. Ray
25 himself just tell her that she was fine, Liz says

1 no, not moving except to turn her head. Ms. Tucker
2 testified because she heard the defendant say Liz
3 knew what she was doing and because Liz had
4 responded promptly, that she let things be.

5 Laurie Gennari testified about that same
6 situation. She testified how when she saw Liz
7 Neuman after the sixth round that she looked awful,
8 like a drunk. And she testified that she heard
9 Laura call out, that she heard Mr. Ray respond, and
10 Laura -- or Laurie Gennari described Liz Neuman as
11 a person who was obviously collapsing.

12 Ms. Gennari testified that she had
13 suspended her normal common sense in order to have
14 the experience as instructed and promised by the
15 defendant and that she had been instructed many
16 times by the defendant to let them have their own
17 experience. Yet another witness who sets aside
18 their own instinct to take care of people because
19 the defendant has told them to let people have
20 their own experience and because the defendant has
21 told them that this is normal and they don't know
22 what to expect.

23 Contrary to what Mr. Li stated in his
24 argument to the Court, Lou Caci is a witness who
25 does describe what he heard from Liz Neuman as the

1 sort of breathing he had heard from both his father
2 and his brother shortly before they each died.

3 Specifically about Kirby Brown and James
4 Shore, many, many witnesses testified that somebody
5 called out for help and that Mr. Ray responded.
6 Melissa Phillips testified that she herself saw
7 Kirby Brown, noted the distress of Kirby, and
8 called out five to six times that there was
9 something wrong with Kirby and that she needed to
10 be taken out.

11 Ms. Phillips testified that she called
12 out to the defendant loud enough for him to hear
13 her and that someone responded, she's fine, but
14 that Ms. Phillips did not recognize that voice.

15 Beverly Bunn testified that around
16 round 6 or 7 she heard a voice say, I can't get her
17 to -- quote, someone's not breathing, and that she
18 heard the defendant respond, the door is closed.
19 This round has begun. We'll deal with it at the
20 end of the next round. Dr. Bunn testified as to
21 her own growing concern because the round ended.

22 At that point Dr. Bunn, as well as the
23 defendant, knew that Kirby Brown, in Dr. Bunn's own
24 testimony, was not breathing. The defendant had
25 said, we'll check up with her after the end of the

1 round, and he did not.

2 The sixth round came to an end. And
3 instead of at that point, as he had promised,
4 checking up on Kirby, the defendant then started
5 the seventh round.

6 And, of course, the Court heard the
7 testimony of Dawn Gordon and Mark Rock, and
8 specifically Dawn Gordon, who testified that at the
9 beginning of the sixth round James Shore dragged
10 out Sidney Spencer, came back. The first time she
11 was interviewed by the detective, her -- what she
12 told the detective was that James Shore came back,
13 yelled out that Kirby Brown needed help.

14 On the stand she testified that he came
15 back and he put it out there that Kirby Brown
16 needed help. That was between the sixth and the
17 seventh. The defendant, according to many
18 witnesses, responded, the door is closing. We'll
19 deal with it -- we'll deal with it at the end of
20 the next round.

21 The defendant then goes through the
22 entire seventh round, Your Honor, knowing now that
23 Kirby Brown is in trouble. The seventh round comes
24 to an end. And according to Dawn Gordon, James
25 Shore again calls for help, calls out that he needs

1 help with Kirby. And, again, the defendant
2 responds, the door is closing. It's too late.

3 And what Dawn Gordon's testimony is, at
4 that point James Shore then tries to get some air
5 out of -- from the edge by lifting the edge of the
6 tent creating light. And now we're into the last
7 round. He lifts up the edge of the tent, creates
8 light. Having failed to get the defendant to get
9 Kirby out, he's now trying to get air for Kirby and
10 for himself, creates light. And the defendant
11 yells out, turn off the light. At that point, he
12 puts down the edge of the flap.

13 Dawn Gordon testified she continued to
14 hear the labored breathing of Kirby up to toward
15 the end of round 8, but by the end of round 8 all
16 is quiet.

17 Many other witnesses, Your Honor, also
18 testified about hearing the conversation from James
19 Shore that Kirby is in distress and how the
20 defendant responded. Dr. Wagoner testified that
21 she heard someone say, wait. There's one more, and
22 heard the defendant respond, they'll have to wait
23 until the next round.

24 Mark Rock testified how he heard someone
25 say, I think she's in trouble. She needs to get

1 out. And the defendant responded, we're closing
2 the gate, and we'll deal with that after the next
3 round.

4 Kim Brinkley testified she heard the
5 labored breathing coming from the area where Kirby
6 Brown sat and how concerning it was. And then, of
7 course, the testimony of Dawn Gordon. All of those
8 are participants inside the tent.

9 And in terms of distance, the people who
10 are at the 12:00 o'clock position are -- are
11 arguably further from Mr. Ray -- are definitely
12 further from Mr. Ray than Sara and Debbie Mercer
13 who are right outside the door.

14 Debbie Mercer testified about the sixth
15 or seventh round how she sees James Shore bring out
16 Sidney Spencer, knock his head on a post -- and the
17 autopsy does show an abrasion on his upper
18 forehead -- how he turns around and goes back in.
19 And then she hears someone say, so-and-so is
20 unconscious. I can't get them to respond.

21 And from her position right next to the
22 defendant, she testifies she hears the defendant
23 reply, really? They're not breathing? And someone
24 answers, no. And the defendant says, they'll be
25 fine. That's where they need to be.

1 Sara Mercer testified that she heard
2 someone say, there are a few people unconscious,
3 and that the defendant said, it was a good day to
4 die; that someone asked the defendant if they
5 should take them out, and Mr. Ray replied, it's
6 just one round. Leave them there. They would be
7 okay.

8 And then Fawn Foster testified that she
9 heard that there were three people down and heard
10 the defendant ask whether they were breathing. She
11 did not hear the reply, but she did hear the
12 defendant say, leave them until the end of the next
13 round.

14 I want to reserve some time for
15 Mr. Hughes to talk specifically about the issue of
16 a duty. But just quickly, Judge, I want to cover
17 the issue of -- of gross deviation and whether or
18 not the defendant's conduct was a gross deviation
19 from the standard of conduct that a reasonable
20 person would observe in that situation.

21 The jury heard testimony from
22 Dr. Dickson, who testified that if you were to
23 do -- in preparation for a heat event, that a
24 participant should take time to acclimate to the
25 heat, should get plenty of sleep and rest, should

1 be in top physical condition, should not fast or
2 abstain from water prior to the event, should be
3 well hydrated, and should hydrate continuously
4 throughout the event, should be educated on the
5 signs and symptoms of heat illness so that they can
6 look out for themselves, and specifically should
7 get out of the heat and immediately cool off before
8 experiencing that change in mental status, which is
9 the hallmark of heat stroke.

10 Dr. Dickson testified that they should
11 also employ a buddy system, looking out for the
12 health of one another and especially those changes
13 in mental status.

14 All of that is exactly what Mr. Ray not
15 only did not do, but he told his participants to
16 not do, told them not to look out for one another
17 and did not prepare them in a manner that a
18 reasonable person should prepare somebody for a
19 heat event.

20 The Court heard some testimony from some
21 witnesses about other sweat lodge ceremonies and
22 how other facilitators conduct them. Specifically,
23 the Court heard that the role of a facilitator is
24 to make sure that everyone inside a sweat lodge
25 ceremony is safe, without danger, without injury,

1 and is free from danger; that the facilitator needs
2 to make contact with participants both during and
3 in between rounds, and that they need to monitor
4 the heat to make sure that it is not overwhelming.

5 The jury heard testimony from witnesses
6 who described a typical sweat lodge ceremony that
7 they had been in and that none of them had
8 exceeded -- ever exceeded four rounds and that they
9 had never ever used as many rocks and as much water
10 as Mr. Ray used.

11 What we know from the testimony is that
12 Mr. Ray himself knows his sweat lodge events, his
13 heat events, are hotter and intend for them to be
14 hotter than any other person's sweat lodge
15 ceremonies, that he intentionally calls for more
16 rocks and water than other facilitators do.

17 We know from the testimony that he
18 doesn't check up on anybody during the ceremony or
19 between rounds. And we know, of course, that he
20 continued the event in spite of the obvious
21 distress of many participants, including the
22 victims.

23 With that, Your Honor, I'd like to allow
24 the remaining amount of my time for Mr. Hughes to
25 talk about the issue of duty.

1 THE COURT: Thank you.

2 Mr. Hughes.

3 MR. HUGHES: Thank you, Your Honor. I reckon
4 I have about five minutes?

5 THE COURT: Correct.

6 MR. HUGHES: Thank you.

7 Your Honor, I did want to address a
8 couple of the points that Mr. Li raised.
9 Specifically, that there's a due-process violation
10 in raising the -- the duty that's addressed in the
11 state's response at this point.

12 There's a case, State versus Puryear,
13 P-u-r-y-e-a-r. It's actually cited in the
14 defendant's motion. It's 121 Ariz. 359. It's an
15 Appellate case from 1979. That case dealt with a
16 young man who was killed in a hunting accident.
17 The shooter was charged with reckless manslaughter
18 that was based on the shooter's violation of
19 misdemeanor statutes.

20 The indictment never set forth what
21 misdemeanor statutes the shooter, the defendant,
22 was being -- had allegedly violated. The defendant
23 never challenged the sufficiency of the indictment,
24 which is the same case as we have here, and then
25 later raised that claim once the case was underway

1 at trial.

2 The Court found that the -- the
3 due-process violation, which -- which arguably
4 should have included in the indictment, the -- the
5 theory that these were particular statutes, hunting
6 without a license, I think hunting out of the
7 season, maybe shooting from a road. These are the
8 misdemeanor statutes. Probably should have been in
9 the indictment.

10 But because the defendant didn't raise
11 them, as in this case, the defendant didn't raise
12 an issue with the indictment, and because the
13 defendant had full disclosure about the state's
14 case, the police reports and that sort of thing,
15 which has also occurred here, that there was no
16 actionable violation of due process.

17 In this case I asked my paralegal over
18 the break to do a real quick check. And at this
19 point we filed 57 disclosure statements,
20 Your Honor. The majority of those were filed
21 before the case began. Over 8,000 pages of
22 documents and photos have been disclosed. Many of
23 those include transcripts of witness testimony, the
24 police investigation. There has been the full and
25 complete disclosure in this case as there was in

1 the Puryear case.

2 And to the extent that there was any
3 violation by not including a -- the common law duty
4 that the defendant violated and the charging
5 document, just like in Puryear, the misdemeanor
6 statutes were not included, that has been
7 corrected, Your Honor.

8 With respect to Mr. Li's argument that
9 Far West recognized that something to the effect of
10 not every violation of a common law duty is
11 criminal, that's correct. Because there's a
12 difference between civil negligence and there's
13 a -- and the mental states that are required for
14 crimes. There's also the fact that for an omission
15 to be criminal, there's only very few crimes where
16 it will fit, including the homicide cases, which we
17 have here, the negligent homicide and the reckless
18 manslaughter, that require additional elements
19 beyond that omission and -- and breach.

20 In this case there were not arguing a
21 simple civil negligence. The state has provided
22 substantial evidence that Mr. Ray's conduct rose to
23 reckless conduct and certainly to negligent
24 conduct.

25 Mr. Li argued a waiver issue. I don't

1 believe he cited any case law that says that you
2 can waive the right to have a negligent homicide or
3 a right to have a crime committed against you. In
4 fact, if there was such a way in the Far West case,
5 I would imagine the employer in that case would
6 have had its employees sign a waiver saying we
7 waive any right to be protected by OSHA.

8 In the case involving the -- the young
9 man who was killed by the Russian roulette game,
10 you could never have a prosecution for Russian
11 roulette if the survivor is -- was able to say,
12 well, the decedent, the victim, assumed the risk.
13 The victim voluntarily engaged in this Russian
14 roulette. And the case -- the Russian roulette
15 case that's cited in the pleadings did say that
16 Russian roulette could be prosecuted as a crime,
17 although under those circumstances the shooting
18 actually took place hours later and it was not
19 involved -- it was not part of the Russian roulette
20 game. That's why in that case it was not a crime.

21 Mr. Li argued that we have to prove that
22 the defendant knew the victim was helpless. That's
23 not the case. Restatement Section 322 says if the
24 actor knows or has reason to know. In this case
25 the jury has been provided with ample evidence that

1 Mr. Ray knew and had reason to know that people
2 were helpless, the victims were helpless.

3 Not only did Mr. Ray tell the
4 participants you can become unconscious and pass
5 out, which shows he recognized that that was a
6 possibility, there's been the testimony of
7 witnesses about the statements that were made to
8 Mr. Ray and about his responses, leave them be.
9 The door is closing. That's evidence that shows
10 Mr. Ray knew and had reason to know that the
11 victims were helpless in this particular case.

12 There was some examples or -- or argument
13 that, well, if this Restatement 322 were to apply,
14 it could only apply -- for example, in Maldonado,
15 that was intentional injury to the plaintiff.
16 Maldonado never says intentional injury. In fact,
17 Maldonado goes out of the way to say that the
18 conduct can be tortious or innocent, which is what
19 the Restatement says, the comment states, and I
20 believe the Tubbs case that Maldonado cites. They
21 all talk about that the actor's conduct can be
22 tortious or innocent.

23 In fact, the cases that are cited in
24 Maldonado even say that the -- the victim could be
25 contributonly (sic) negligent with that conduct.

1 It doesn't matter. Once an instrumentality under
2 the actor's control causes the harm to the victim,
3 the actor, which in this case is Mr. Ray, is
4 responsible to act in a reasonable manner to
5 prevent further injury. And there's been ample
6 testimony that Mr. Ray did not comply with that
7 duty.

8 The evidence that's been adduced is that
9 in this particular case Mr. Ray was conscious, was
10 talking, was directing things throughout the
11 ceremony. When the ceremony ended, we had a
12 witness said that he was one of the few people who
13 was actually able to get out himself and walk to a
14 chair. He was talking until the end of the
15 ceremony. He went to a chair and he sat down.

16 That's substantial evidence that a jury
17 can use to infer that Mr. Ray had the ability to
18 carry out his duty to Kirby Brown, James Shore, and
19 Liz Neuman.

20 And in particular, that duty arose not
21 only at the time the sweat lodge ceremony ended,
22 but it arose when he first became aware that there
23 was a problem, and that was when the
24 participants -- at the very latest, when the
25 participants were starting to pipe up and say

1 things like she's passed out or she's not
2 breathing.

3 There's testimony from the medical doctor
4 that people who are suffering from heat-related
5 illnesses, particularly heat stroke, need care
6 within a very short period of time. Sara Mercer
7 testified that when the sweat lodge ceremony ended,
8 Mr. Ray got up, walked over and sat in a chair. It
9 was 15 minutes, according to Sara Mercer, before
10 anyone went inside. And the jury can take that
11 testimony together with Dr. Dickson's testimony
12 about the need for immediate urgent care for people
13 who are suffering from heat stroke to find that but
14 for Mr. Ray's conduct, the injury -- further injury
15 would not have occurred.

16 Your Honor, I think I may have gone over
17 by a minute or so, but I thank you for your
18 patience.

19 THE COURT: Thank you.

20 Mr. Li, rebuttal?

21 MR. LI: Yes, Your Honor. Thank you. I'll
22 try to be closer to the schedule, Your Honor.

23 What's missing from the state's entire
24 72-minute presentation is any articulation of what
25 conduct constituted the crime. And what -- no

1 articulation about how that -- the mens rea
2 connected to that particular conduct. It's
3 critical, Your Honor.

4 It's not just a disclosure obligation
5 where if we look at enough of the -- the -- the
6 discovery, we might be able to figure out what the
7 state thinks it might be alleging. What -- what
8 we've gotten here is, essentially, the same that
9 we've gotten throughout this trial, which is just a
10 barrage, a fire hose, of every fact that the state
11 can think of but with no discrimination as between
12 what fact is actually the crime.

13 What is the mens rea? How is this Court
14 going to make a ruling as to what the mens rea was
15 when a particular conduct was done? We don't have
16 that. We've never had that articulation. It's not
17 a simple disclosure problem, Your Honor. It's a
18 due-process violation.

19 And now it's amazing that the state would
20 take the position that, well -- you know -- you
21 could have figured out what we were thinking, but
22 no harm, no foul, because we told you the day after
23 we closed or -- you know -- three days after we
24 closed the case.

25 That's not how our -- our laws work,

1 Your Honor. It -- it never has. There's --
2 there's scads of cases about how that's a violation
3 of due process and frankly illegal. And the -- the
4 state knows well and has seen those cases that are
5 cited in our brief and has no cases to the
6 contrary.

7 With respect to a number of the factual
8 representations that were made by the state, I -- I
9 think it goes without saying that the defense --
10 you know -- vehemently disagrees with the -- the
11 accuracy of some of those representations.

12 And so to the extent that the Court is
13 going to rely on any of the purported evidence that
14 the state has provided, I would ask the Court to
15 actually look at the transcript. The transcripts
16 do not bear out many of the statements that -- that
17 were made.

18 THE COURT: Mr. Li, I don't want to take your
19 time. I indicated you'd -- you would have 12
20 minutes more, so I won't contest that.

21 Examples of that testimony about Dawn
22 Gordon and that Mr. Ray said is being coincidental
23 to what happened at the end of round --

24 MR. LI: Yes, Your Honor.

25 THE COURT: -- as to a response. Is that --

1 that's what you're referring to?

2 MR. LI: Yes, Your Honor.

3 THE COURT: Dawn Foster and there was
4 clarification, I guess, about this breathing versus
5 unconscious.

6 MR. LI: Yes, Your Honor.

7 THE COURT: There was that as an example.
8 I -- also with what Ms. Polk was reciting about
9 Dr. Dickson's medical advice, what it would be,
10 seemed to be far more inclusive than anything I
11 have. Those are some examples I noted, but --

12 MR. LI: Yes, Your Honor.

13 THE COURT: -- I've taken a minute of your 12
14 additional minutes. So --

15 MR. LI: And I would also cite that this
16 apparently -- according to Ms. Fredrickson,
17 apparently alarmed at the large number of stones
18 called by the defendant. There's just literally no
19 testimony relating to that. This is the Megan --
20 Megan Fredrickson testimony about James -- you
21 know -- these folks are your responsibility.
22 There's literally no testimony related to that.

23 I could go through the record. And I've
24 spent a lot of time highlighting it. If the Court
25 wants us to brief it, we will be more than happy to

1 submit a brief with all of what we believe are the
2 inaccuracies that are contained in this brief
3 and -- and give the Court the actual citations that
4 would demonstrate the inaccuracies.

5 I don't think it's critical because I
6 don't think anything that's actually said here
7 changes the basic legal issue. But we'd be more
8 than happy to take care of that if that's what the
9 Court wants.

10 With respect to the mens rea -- and I
11 just want to know, how much time do I have now,
12 Your Honor?

13 THE COURT: Nine minutes.

14 MR. LI: Nine minutes. Okay.

15 With respect to the mens rea issue, the
16 state does not adequately deal with the fact that
17 these cases involve children and dogs. It is -- it
18 is obvious -- I have a seven year old. I'm not
19 going to leave my seven year old in the car with
20 the windows rolled up because she is not somebody
21 who's legally capable -- not just -- she's just
22 not -- everybody knows you can't leave your child
23 in the car. Okay?

24 That's a big difference than a
25 40-year-old doctor -- you know -- an emergency --

1 or an immediate care doctor who's in there or a
2 stockbroker or -- or an accountant or a dentist or
3 all the kinds of folks that the Court heard from.
4 The cases that the state cites are woefully
5 inadequate. I mean, just absolutely inadequate.
6 All of the cases that the state cites in that -- in
7 that mens rea section relate to minors.

8 The Russian roulette case, Lewis v.
9 State, that's a minor. He's 15 year old. There's
10 a reason why -- the victim. There's a reason why
11 the law has different rules for minors. State v.
12 Marty. That's also a minor. These cases that the
13 state cites are inapposite because they don't deal
14 with competent adults.

15 One quick correction. Again, the waiver
16 issue. We are not saying that you can waive a
17 criminal case. That is not -- you know --
18 that's -- that's sophistry. What we're saying and
19 what we're asking this Court to analyze is in
20 considering whether there's a legal duty upon which
21 a duty to act becomes premised upon which criminal
22 liability can then be imposed.

23 We are asking this Court to consider that
24 if consenting parties waive the duty of care,
25 whether that sort of duty of peril no longer

1 exists, so therefore you cannot then imply a duty
2 to act and then you cannot then hinge criminal
3 liability upon that purported duty to act. There
4 is no case law. The state can cite no case law
5 whatsoever for the proposition that it's espousing
6 right now.

7 I want to quickly talk about the -- the
8 negligent homicide issue. Many of the arguments
9 are identical. Many, many of the arguments are
10 identical. But one that is not is that it is not
11 just some general sense -- the only difference
12 between criminal negligence -- sorry, negligent
13 homicide and reckless manslaughter, the only
14 difference is in reckless manslaughter the -- the
15 actor must be -- the defendant must be conscious --
16 consciously disregard the substantial and
17 unjustified risk.

18 The negligent homicide requires a failure
19 to appreciate the substantial and unjustifiable
20 risk. The failure must be a gross deviation from
21 the norm. It is not some general sense of
22 negligence in the sense that, oh, we didn't have --
23 there weren't enough procedures in place and that's
24 criminally negligent, or, oh -- you know -- you
25 should have done this, you should have done that,

1 all the various things that the state suggested
2 Dr. Dickson allegedly said. Those -- that's not
3 what creates criminal negligence.

4 Criminal negligence is the failure to --
5 and this is in the statute. It's not -- I'm not --
6 this is not a case law issue. This is in the
7 statute. It's the failure to perceive the
8 substantial and unjustifiable risk of death where
9 the failure is a gross deviation.

10 So what we have -- what the state would
11 have to prove is that Mr. Ray's failure to perceive
12 the fact that folks were dying was criminally
13 negligent, that it was a heinous and -- and gross
14 failure. And the state has not done that. And
15 much of the evidence that we've -- we've already
16 provided this court relating to that demonstrates
17 that.

18 Just quickly, with respect to Mr. Shore,
19 starting with there is literally no evidence that
20 anybody knew he was dying. He was talking all the
21 way till the end. He helps somebody out. He came
22 back in. You know, he used physical strength to
23 move somebody over. Nobody knew. There's
24 literally no evidence at all about Mr. Shore.

25 With respect to Ms. Neuman, you already

1 had heard the recitation of the facts. The state
2 and the -- and the -- and the defense don't
3 particularly disagree. It is a fact that she said,
4 no, I don't need to come out. And Ms. Brown was
5 conscious and breathing all the way to the end, and
6 the person lying next to her did not know that she
7 was dying. So how can it possibly be a gross
8 deviation from the standard of care when Mr. Ray
9 didn't know?

10 Now, the state has interjected a standard
11 of care into this case about other people's sweat
12 lodges and how other people did -- do things.
13 That's not the law. The law of the case here,
14 Your Honor, in the Court's May 25th, 2011, ruling
15 is that there is no such standard of care. So the
16 only standard of care is what a reasonable person
17 would do. And we have 50 reasonable people sitting
18 in there who are trying to -- you know -- who are
19 just doing -- observing exactly the same things
20 that everybody else is observing and not knowing.

21 The very last thing I -- I wanted to
22 address is that the state continues to -- to both
23 on the one hand say that Mr. Ray's speech is
24 criminal and is inducing people to do bad things
25 and on the other hand saying that it's only

1 evidence.

2 They are literally arguing that the words
3 Mr. Ray used caused people to do things. The
4 moment they do that, they implicate the First
5 Amendment and the protections of Brandenburg. And
6 I've told the Court what the factors are. It must
7 be intended to induce the bad behavior, it must be
8 imminent, and it must be likely.

9 The final point I'd make, Your Honor, and
10 this has to do with the -- the sort of state of
11 mind of the victims. The state repeatedly says
12 here's what all these other participants thought
13 and felt. They felt ashamed. They wanted to do
14 this. They felt about this. They felt about that.
15 That's entirely irrelevant to what the particular
16 decedents were thinking at a particular time.

17 We have no idea what they were thinking.
18 Some of the participants felt that they could leave
19 anytime and -- and were very strong and had all
20 sorts of -- you saw the -- the testimony. And some
21 were -- were, in my opinion, a little odd. Okay?
22 But you can't take those various people's opinions
23 about why they did things and attribute them. As a
24 matter of law, you cannot take them and attribute
25 them to -- to the decedents. That would be a new

1 rule of law that has never been exercised ever
2 before.

3 Your Honor, in our brief we lay out, I
4 believe, 12 other areas of law, new areas of law,
5 that this Court would have to find to deny our
6 motion for Rule 20. We urge the Court not to do
7 so. The state has failed in its burden, and we
8 urge this Court to grant Rule 20 as to all counts.

9 THE COURT: Thank you, Mr. Li.

10 MR. LI: Thank you, Your Honor.

11 THE COURT: A hundred pages of briefing and
12 about an hour half of argument. It would be very
13 difficult for this Court just to start in and go
14 through a number of factors that would go into my
15 decision on the Rule 20.

16 Rule 20 rulings, in my experience, are
17 often conclusory. And that may not be satisfactory
18 or satisfying to the parties, but that this ruling
19 is going to be necessarily conclusory as well.

20 The first point has to do with whether or
21 not there's a legal duty. That's a question for
22 the Court. That's not a question of whether
23 there's substantial evidence as to an element.
24 It's a question for the Court. And I conclude that
25 the defendant, Mr. Ray, owed a legal duty to the

1 decedents.

2 That question may be first -- was first
3 addressed in the admissibility of evidence about
4 amounts paid for the event. And I'm aware of the
5 distinction between Mr. Ray personally and JRI.
6 The defense has -- had argued that throughout the
7 course.

8 So in -- in making this conclusion -- in
9 stating this conclusion, I am aware of the
10 distinction between entities, between a person and
11 a corporate or business structure. But there is an
12 element of a contractual basis for the duty. And
13 that -- that's what's been noted. There may be
14 others.

15 The state has presented substantial
16 evidence as to voluntary acts as well as omissions.
17 And I'll -- I'll state right now --

18 And, Mr. Li, you've -- you've raised
19 this. There -- there may be real questions
20 regarding duplicity. And that's, I think, a
21 separate issue. I find that it is a separate issue
22 from this ruling on the Rule 20.

23 With regard to mens rea, I conclude there
24 is substantial evidence of the mental state of
25 recklessness. With regard to causation, I conclude

1 there's substantial evidence going to both cause in
2 fact or but for causation as well as proximate
3 cause. I'll note Dr. Dickson's testimony with
4 regard to causation.

5 With regard to the First Amendment, I --
6 I note in prior rulings I did mention that, the
7 importance of the context of legal duty. And I
8 conclude that there has not been a violation of
9 First Amendment principles in the presentation of
10 evidence.

11 And I also conclude in this Rule 20
12 context that there has not been a due-process
13 violation.

14 In summary, it's ordered denying the
15 motion pursuant to Rule 20.

16 The jury is returning at 12:30. I mean,
17 excuse me, 1:30. And I want to resume the trial at
18 2:00 o'clock, about an hour. We'll be in recess.

19 (Recess.)

20 THE COURT: The record will show the presence
21 of Mr. Ray, the attorneys, and the jury.

22 Ms. Do, you may call your witness.

23 MS. DO: Thank you, Your Honor. The defense
24 calls Dawn Sy.

25 THE COURT: Okay.

1 Ma'am, please step to the front of the
2 courtroom where the bailiff is directing you.
3 And raise your hand and be sworn by the
4 clerk.

5 DAWN SY,
6 having been first duly sworn upon her oath to tell
7 the truth, the whole truth, and nothing but the
8 truth, testified as follows:

9 THE COURT: Please be seated here to my right.

10 Would you please begin by stating and
11 spelling your full name.

12 THE WITNESS: My name is Dawn Sy. First name
13 Dawn, D-a-w-n; last name, Sy, S, as in Sam, Y.

14 THE COURT: Thank you.

15 Ms. Do.

16 MS. DO: Thank you, Your Honor.

17 DIRECT EXAMINATION

18 BY MS. DO:

19 Q. Good afternoon, Ms. Sy.

20 A. Good afternoon.

21 Q. Would you please tell the jury what you
22 do for a living.

23 A. I'm a criminalist employed by the Arizona
24 Department of Public Safety Crime Lab in Phoenix,
25 Arizona.

1 Q. And how long have you been a criminalist?

2 A. I've been a criminalist there for 16 1/2
3 years.

4 Q. So since approximately 1995?

5 A. Yes. The start of 1995.

6 Q. Now, you told the jury that you are a
7 criminalist employed by the Arizona Department of
8 Public Safety; is that --

9 A. Correct.

10 Q. Could you tell the jury if that is a
11 state or local law enforcement agency.

12 A. That is a state agency.

13 Q. So would it be correct that you are
14 employed by the State of Arizona?

15 A. That is correct.

16 Q. Would you tell the jury what education
17 you received, if any, to qualify you for this
18 position as a criminalist.

19 A. I have a bachelor of science in forensic
20 science from Michigan State University, which
21 included 30 hours of chemistry, including a
22 year-long course in forensic science or chemistry
23 specific to working in a crime lab.

24 Q. Thank you. I'd like to talk to you a
25 little bit about what the Arizona Department of

1 Public Safety is. You told the jury that that is a
2 State agency; correct?

3 A. Correct.

4 Q. Could you tell the jury how many
5 different crime labs there are with that
6 department.

7 A. Within my department we have four crime
8 labs in -- one in Phoenix, one in Flagstaff, one in
9 Lake Havasu City, and one in Tucson.

10 Q. Is the one in Phoenix the headquarters?

11 A. Yes, it is.

12 Q. The Department of Public Safety. Does it
13 only have crime labs or are there other divisions
14 within?

15 A. There are other divisions within the
16 department.

17 Q. Would you please tell the jury.

18 A. There are divisions such as highway
19 patrol, the patrolmen you see out on the highways.
20 There are a narcotics division, special
21 investigations unit, special operations unit.
22 There's also a gang task force, gang unit.

23 Q. Are you a sworn peace officer or civilian
24 employee?

25 A. I'm a civilian employee.

1 Q. The folks who work in the divisions that
2 you just mentioned -- the highway patrol,
3 narcotics, gang unit -- are those sworn peace
4 officers?

5 A. They are.

6 Q. Do you know how many employees are within
7 the Arizona Department of Public Safety?

8 A. I do not.

9 Q. Do your crime labs fall under a
10 particular division of the Department of Public
11 Safety?

12 A. They do.

13 Q. And what is that?

14 A. We are in the scientific analysis bureau.

15 Q. And to shorten it, can I call the
16 Department of Public Safety, DPS?

17 A. Yes.

18 Q. Is that what it's commonly referred to?

19 A. Yes, it is.

20 Q. Let's talk a little bit about the crime
21 labs. You indicated that there are four throughout
22 the state.

23 A. That's correct.

24 Q. And what kind of employees work in the
25 crime labs other than criminalists?

1 A. We have support personnel, laboratory
2 technicians that do our ordering and keep up our
3 chemicals. We have secretaries and we have
4 managers.

5 Q. All right. Are there also scientists and
6 technicians in addition to criminalists?

7 A. Yes.

8 Q. And what kind of services do these crime
9 labs provide to the citizens of the state of
10 Arizona?

11 A. We analyze evidence that comes in from
12 police agencies in cases that are criminal.

13 Q. So you analyze evidence in criminal
14 matters?

15 A. Correct.

16 Q. And do you service a particular agency or
17 do you service agencies throughout the state?

18 A. We service agencies throughout the state.

19 Q. And could you tell the jury how that
20 works.

21 A. Agencies from around the state submit
22 evidence to us in one of our four laboratories.
23 They request a specific analyst -- analysis type,
24 and we perform that analysis and issue reports.

25 Q. Do you, as a criminalist, work in a

1 particular unit?

2 A. I do.

3 Q. What unit is that?

4 A. I'm currently in the latent print unit.

5 However, I was previously in the trace analysis
6 unit.

7 Q. What does the latent print unit do?

8 A. Latent print unit analyzes evidence for
9 the presence of latent prints, prints left behind
10 by people who are -- who leave prints that are not
11 visible and also visible prints.

12 Q. Identifying fingerprints of perpetrators?

13 A. And potential victims or other people.

14 Yes.

15 Q. Okay. And then the trace analysis unit.

16 What is that?

17 A. Trace analysis is a broad unit. It
18 analyzes a lot of things that come in that aren't
19 under the umbrella of other units. We look at
20 things like fire debris for the presence of
21 ignitable liquid or other volatiles. We look at
22 paint, explosives, hairs, fibers, glass, things
23 such as that.

24 Q. And how long did you work in the trace
25 analysis unit before you transferred to the latent

1 print unit?

2 A. 11 years.

3 Q. Are there other units within the crime
4 labs other than trace analysis and latent print?

5 A. Yes, there are.

6 Q. Could you tell the jury what the other
7 ones are.

8 A. We have an alcohol unit that handles
9 blood and breath alcohol. We have a toxicology
10 unit that handles drugs in urine and blood. We
11 have a controlled substance unit that looks at
12 drugs, solid-dose drugs. We have three DNA units,
13 one that's database specific. We have one that's
14 casework specific and a mitochondrial DNA unit. We
15 also have latent prints and trace evidence.

16 Q. Would you consider the DPS crime lab a
17 full-service or full-resource crime lab?

18 A. Yes.

19 Q. Do you have state-of-the-art equipment?

20 A. We do.

21 Q. And you indicated that prior to going to
22 the latent print, you were working for the trace
23 analysis unit for 11 years?

24 A. Correct.

25 Q. Would you tell the jury what your duties

1 were as a criminalist in that particular unit.
 2 **A. In that unit I analyzed fire debris for**
 3 **the presence of ignitable liquids. I analyzed**
 4 **paint cases, explosive cases, miscellaneous trace**
 5 **cases, things that come in that they just ask, what**
 6 **is this? And I have in the past analyzed hair**
 7 **cases.**

8 **Q.** Hair cases?

9 **A. Yes.**

10 **Q.** All right. The -- the items that you
 11 mentioned -- ignitable liquids, the explosives, the
 12 paint -- that suggests to me that you worked in a
 13 lot of arson cases. Is that true or not true?

14 **A. That is true.**

15 **Q.** You also mentioned earlier that you also
 16 analyzed something called "volatiles"?

17 **A. That is correct.**

18 **Q.** Would you tell the jury what volatiles
 19 are.

20 **A. Volatiles are just substances that are**
 21 **readily converted to the gas form at certain**
 22 **temperatures.**

23 **Q.** Okay. So if I understand that correctly,
 24 you might have an object that is either liquid or
 25 solid that at a certain temperature releases into

1 gas form?

2 **A. Correct.**

3 MR. HUGHES: Objection. Leading.

4 THE COURT: Overruled.

5 **Q.** BY MS. DO: And that's what a volatile
 6 is?

7 **A. Yes.**

8 **Q.** Now, you -- you talked about how the DPS
 9 crime labs -- and there are four of them in the
 10 state -- will service local law enforcement
 11 agencies?

12 **A. That is correct.**

13 **Q.** Now, do you -- does DPS crime lab provide
 14 that service under a contract or is it mandated by
 15 law?

16 **A. I believe it's mandated under the Arizona**
 17 **statutes.**

18 **Q.** So meaning mandated by law?

19 **A. Yes.**

20 **Q.** And so let me give you a hypothetical.
 21 If an agency in -- let's take Phoenix. That's
 22 Maricopa County?

23 **A. Yes.**

24 **Q.** If the sheriffs in Maricopa County had a
 25 criminal matter and they submitted requests to you

1 to have certain evidence items tested, how do those
 2 requests get processed?

3 **A. First it comes into our property and**
 4 **evidence unit where they sign a chain of custody,**
 5 **take things in. When they take it in, a request**
 6 **form is filled out by the agency, the officer who**
 7 **is submitting it. And then that request form goes**
 8 **to the appropriate unit.**

9 **Q.** And who decides which unit it will go to?

10 **A. Our secretaries typically send it to the**
 11 **appropriate units.**

12 **Q.** They know which unit?

13 **A. Yes. Based on what's requested.**
 14 **Sometimes they don't get it right and the**
 15 **supervisor of that unit will send it to the**
 16 **appropriate unit.**

17 **Q.** And do you have a supervisor when you
 18 were in the trace unit -- trace analysis unit?

19 **A. I did.**

20 **Q.** So when a local agency submits a request
 21 to have evidence items tested, it's then routed to
 22 the appropriate unit?

23 **A. That's correct.**

24 **Q.** When the appropriate unit receives it,
 25 what's done next?

1 **A. Each unit handles things differently.**
 2 **But in the trace evidence unit, they would just go**
 3 **in files in DR number order, or records, number**
 4 **order of when it came in, the oldest being worked**
 5 **first working up to the newest.**

6 **Q.** And what is the DR? Could you tell the
 7 jury.

8 **A. It's the department's records number.**
 9 **It's just a way of tracking all the cases that come**
 10 **into the laboratory.**

11 **Q.** And where does that number begin?

12 **A. It depends on whether it's --**

13 **Q.** That was a poor question. I don't mean,
 14 like, where does it begin sequentially. But does
 15 that DR number originate with the requesting
 16 agency?

17 **A. Yes, it does.**

18 **Q.** Okay. So, for example, if the Maricopa
 19 County sheriffs submitted a case to you, they give
 20 you the evidence items with the DR number?

21 **A. They call our agency and request a DR**
 22 **number or they request the DR number when they**
 23 **bring the evidence in.**

24 **Q.** If your lab has the capability to conduct
 25 a test that is requested, does the lab then perform

1 the testing?

2 **A. Yes.**

3 **Q.** Do you know whether or not the lab, since
4 it's mandated by law, has the authority to refuse
5 testing?

6 **A. We have instances where we don't do --**
7 **perform the type of testing that's requested. So**
8 **in those instances we don't perform the analysis,**
9 **we can suggest other laboratories that it can go**
10 **to -- the Federal Bureau of Investigation or**
11 **private laboratories around the country.**

12 **Q.** Okay. So if you get a request and your
13 lab is not able to handle it, in that instance you
14 would have to say no?

15 **A. Yes.**

16 **Q.** But you would then refer it out to a lab
17 you knew does that particular test?

18 **A. We can. Or we could tell the agency we**
19 **don't have the capability of analyzing that.**

20 **Q.** Okay. But in the instance, for example,
21 you do have the capability -- let's take a DUI
22 case. You have a breath alcohol unit?

23 **A. Yes.**

24 **Q.** Where you analyze breath alcohol for the
25 presence of illegal limit or not?

130

1 **A. Typically those are done in the field by**
2 **officers, but we have support staff that support**
3 **those tests.**

4 **Q.** Okay. So if the Maricopa sheriffs
5 County -- Maricopa County sheriffs have a DUI case
6 and they submit to you for breath alcohol and you
7 have that capability, will the lab say no?

8 **A. We would not. But, again, for breath**
9 **alcohol it's typically done in the field by the**
10 **police agency, not by us. But blood alcohol would**
11 **come in to us and we would do the analysis.**

12 **Q.** Okay. I'm sorry. Let me correct it.
13 Let me give you another example. Let's say you
14 have another case where the suspect drops some
15 evidentiary item that may contain virology that
16 could be tested for DNA.

17 **A. Yes.**

18 **Q.** You do have a virology and DNA unit?

19 **A. We do.**

20 **Q.** Okay. So if the requesting agency asks
21 you to test for DNA and you have the capability,
22 would the crime lab refuse to do that?

23 **A. Not typically. No.**

24 **Q.** Okay. Does your lab dictate to the
25 requesting agency what is tested or what isn't

1 tested if you have the capability?

2 **A. We do say we will not consume an entire**
3 **sample. We ask for a court order or somebody to**
4 **tell us if -- if our analysis would require us to**
5 **consume the entire sample. So in that case we**
6 **would dictate sort of what would be done with it.**
7 **But other than that, we just typically analyze it.**

8 **Q.** Okay. In the 11 years that you have been
9 in the trace analysis unit, the 16 years that
10 you've been a criminalist, have you ever refused
11 testing that you were able to do?

12 **A. I have not personally.**

13 **Q.** All right. So if someone suggested that
14 the DPS crime lab dictates to the requesting agency
15 what is -- what is or isn't tested, based upon your
16 experience, do you know if that's true or not true?

17 **A. Do we dictate? Not necessarily. We**
18 **suggest what samples are better than others.**
19 **Absolutely we do.**

20 **Q.** But you would not flat out refuse a
21 request?

22 **A. I would not be able to. Managers may**
23 **have that capability, but certainly not at my**
24 **level.**

25 **Q.** Okay. In this case, Ms. Sy, you did work

132

1 on a case pursuant to the request of the Yavapai
2 County Sheriff's Office?

3 **A. I did.**

4 **Q.** And, to your knowledge, do you know
5 whether or not any of the criminalists worked on
6 this case other than you?

7 **A. I do not know that any other criminalist**
8 **worked on it besides myself.**

9 **Q.** Okay. And this came in as a request from
10 the Yavapai County Sheriff's Office?

11 **A. That's correct.**

12 **Q.** Did you work with your supervisors to
13 help them in their investigation?

14 **A. I spoke with my supervisors about the**
15 **case. Yes.**

16 **Q.** And what are the names of your
17 supervisors?

18 **A. My direct supervisor was David Sperk.**
19 **His supervisor was Vince Figerelli.**

20 **Q.** You received how many requests from the
21 sheriff's office in this case? Do you know?

22 **A. I personally have looked at one request.**

23 **Q.** One request. Was that for more than one
24 item?

25 **A. Yes, it was.**

1 Q. In any of the -- do you know how many
2 items at this point?

3 A. **I could count them if you would like.**

4 Q. Please do. Go ahead.

5 A. **21 items.**

6 Q. All right. And of those 21 items that
7 were submitted to you, did you test any of those?

8 A. **I tested 8 of them.**

9 Q. Okay. And so 8 of the 21 was tested?

10 A. **Correct.**

11 Q. What happened to the rest?

12 A. **The rest -- rest were received and not
13 analyzed by myself.**

14 Q. And who made that decision?

15 A. **I did.**

16 Q. And could you tell the jury why.

17 A. **In each of the items I received at least
18 four samples, say, of material -- tarp, rocks --
19 and I chose to analyze two of the samples so that
20 two were maintained for further analysis.**

21 Q. Okay. So the request that came in to you
22 came with 21 items of evidence?

23 A. **Correct.**

24 Q. And so that you wouldn't consume the
25 entire sample, you selected 8 as a representative

1 pool, essentially?

2 A. **Yes.**

3 Q. My question to you is -- and we'll get
4 into details so the jury understands what was
5 requested and what you did. Did you in any way
6 refuse or decline to do what the sheriffs had asked
7 you to do?

8 A. **I did what was on the request form. If
9 that was refusing to do something they asked, I --
10 I can't say. But I didn't outrightly refuse
11 something.**

12 Q. Do you believe you did what they asked?

13 A. **Yes.**

14 Q. Okay. And we'll go through that in
15 detail. Let me spend one more -- a few more
16 moments with you on what the crime labs do in
17 addition to testing. Okay?

18 You've been a criminalist for 16 years.

19 A. **Correct.**

20 Q. And so you have quite a bit of
21 experience?

22 A. **Yes.**

23 Q. Now, when a case comes in to you, do you
24 work with the case agent, the requesting agency?

25 A. **Yes.**

1 Q. And what kind of -- what kind of
2 information would you get from the requesting
3 agency?

4 A. **In some instances it's just the request
5 form. They write on there what type of analysis
6 they want, and I perform it. If there's a question
7 as to whether we do something or not, an agency
8 might call -- or an officer might call and ask
9 whether we do a specific type of analysis. And I
10 would tell them whether we would be able to do it
11 or not or what we would be able to do in that case.**

12 Q. Did you ever have an instance where a
13 case agent calls you and -- and tells you, Ms. Sy,
14 this is the kind of case I have? This is the
15 problem I'm looking at? Do you have any
16 suggestions of what kind of test could be done?

17 A. **Yes.**

18 Q. Okay. So let's -- let's use an example.
19 Hypothetically, a case agent calls you and tells
20 you they have a robbery of a convenience store and
21 the robber drops a baseball cap. And in this
22 hypothetical the case agent tells you they have no
23 other evidence of identification. If the case
24 agent tells you that set of facts, what are you
25 able to tell the case agent?

1 A. **In this instance I would tell them that
2 that baseball cap may have DNA. We can possibly
3 analyze it for DNA.**

4 Q. Okay. So in that instance you would be
5 able to work with the case agent to try and figure
6 out what else can be done in the investigation?

7 A. **Yes. Or if it's beyond the scope of my
8 expertise, I would send them to a criminalist or
9 supervisor of the unit that I thought would be
10 appropriate for the type of case it was.**

11 Q. So in your 16 years as a criminalist,
12 have you had that situation come up where you would
13 be able to assist a case agent with a direction of
14 the investigation?

15 A. **Not necessarily the direction of the
16 investigation, but what types of analysis we could
17 do or -- or what we could provide given the
18 evidence that they have.**

19 Q. Okay. So let me give you another
20 hypothetical. If a case agents calls you and tells
21 you I have a possible homicide and I have leads or
22 clues that a toxin or a poison might be involved,
23 what would you be able to tell the case agent in
24 that case?

25 A. **I would be able to tell the agent that we**

1 **potentially could do some types of analysis, some**
 2 **types of analysis we couldn't. I would like to**
 3 **know what type of toxin was there. If we don't**
 4 **know, I could suggest analyses that we could do.**
 5 **And then if we couldn't do specifically what they**
 6 **were asking for, I could suggest agencies that**
 7 **could do it.**

8 Q. Okay. So what I'm trying to understand
 9 is your crime lab with criminalists and scientists
 10 and technicians run the tests that are requested
 11 and also suggest tests that could help in the
 12 investigation?

13 A. We can suggest tests.

14 Q. Let me go to the work you did in this
 15 case. You had already told the jury you received a
 16 request from the Yavapai County Sheriff's Office?

17 A. Correct.

18 Q. Is that correct?

19 Now, how many criminal cases do you work
 20 on in any given year?

21 A. When I was in the trace analysis unit, I
 22 typically worked a hundred cases a year or averaged
 23 around that.

24 Q. And that's a lot. So how do you keep
 25 track of what you do in each case?

1 A. In each case I take notes when I receive
 2 the case, what I do as far as the analysis, and
 3 then I issue a report as to my findings.

4 Q. Are your notes contained in what is
 5 called a "communications log"?

6 A. That is -- the communications log is me
 7 talking to officers, me talking to my supervisors,
 8 that sort of communications that I have. It's not
 9 part of my analysis.

10 Q. Okay. So you have had something called
 11 your "analysis notes"?

12 A. Correct.

13 Q. And then you have something called a
 14 "communications log"?

15 A. Yes.

16 Q. Let me --

17 MS. DO: May I approach, Your Honor?

18 THE COURT: Yes.

19 Q. BY MS. DO: I'm going to show you what
 20 has been marked as Exhibit 584.

21 MS. DO: And, Your Honor, Mr. Hughes is not
 22 objecting, so I move this into evidence.

23 MR. HUGHES: No objection, Your Honor.

24 THE COURT: 584 is admitted.

25 (Exhibit 584 admitted.)

1 Q. BY MS. DO: Looking at 584, do you
 2 recognize those notes?

3 A. I do.

4 Q. And would you tell the jury how you
 5 recognize it and what it is.

6 A. It is a communications log and the
 7 Yavapai Sheriff's Case, DPS DR No. 2009742532. It
 8 has my initials and dates that I talked to people
 9 on it.

10 Q. Okay. So looking up at the screen, what
 11 the -- the DR number you just read is consistent
 12 with what we see?

13 A. Yes.

14 Q. And those are your initials, D.R.S.?

15 A. Yes.

16 Q. Now, I want to use this communications
 17 log since you -- you work on several hundred -- or
 18 a hundred.

19 A. Yes. A hundred approximately.

20 Q. Okay.

21 To talk to the jury about the chronology
 22 of your work in this case. Okay?

23 A. Okay.

24 Q. Can you tell us what date you first
 25 received the request from the sheriff's office of

1 Yavapai County to work on this matter?

2 A. The formal request or when a phone call
 3 came in?

4 Q. When you first noted whatever
 5 communication you had.

6 A. A phone call came in on the 14th of
 7 October of '09, and I spoke with the
 8 representative -- I didn't note the name when I
 9 spoke to that person -- in regards to this case.

10 Q. Okay. So looking up on the screen, do I
 11 have the entry that you noted for October 14, 2009,
 12 up on the board?

13 A. Yes.

14 Q. And what -- what was the communication?

15 A. It was whether we could test rocks and
 16 tarp and determine if toxic volatiles were released
 17 when heated.

18 Q. And at this point you don't recall who
 19 spoke to you on the 14th?

20 A. I do not know.

21 Q. But you're certain that it is someone
 22 from the sheriff's office?

23 A. Yes.

24 Q. From your work on this case, did you
 25 understand what date the alleged incident occurred

1 on?

2 **A. I didn't note it. I didn't know what**
3 **day. It was in the news, so I might have noted it**
4 **that way, but --**

5 **Q.** I'm going to represent to you that the
6 alleged date is October 8th, 2009.

7 **A. Okay.**

8 **Q.** Any reason to dispute that?

9 **A. I have no knowledge.**

10 **Q.** Okay. So the first entry that you have
11 there is October 14, 2009?

12 **A. Correct.**

13 **Q.** And you indicated to the jury, as we see
14 up on the screen, that the request was to test
15 rocks and tarps for the release of toxic volatiles
16 when heated?

17 **A. Yes.**

18 **Q.** Can you tell the jury what toxic
19 volatiles are.

20 **A. "Toxic" just refers to something that**
21 **could potentially kill someone, something that's**
22 **poisonous. And volatiles, again, are just a**
23 **release -- a gas -- something that's at a gas form**
24 **at certain temperatures.**

25 **Q.** So an object that's either liquid or

1 solid releases into a gas form at a certain
2 temperature?

3 **A. Correct.**

4 **Q.** Were you looking for something that was
5 toxic in this case?

6 **A. I was just -- when I spoke to the person**
7 **I spoke to first, it was this is what I can do. I**
8 **can heat it up. I can look and tell you what comes**
9 **off of it. Whether it's toxic or not is not**
10 **something I determine. That would be a medical**
11 **examiner or a toxicologist.**

12 **Q.** Okay. So let me try to understand that.
13 Your job as a criminalist in the trace analysis
14 unit included looking for volatiles?

15 **A. Yes.**

16 **Q.** But as a criminalist you have the
17 expertise or the training to tell the case agent,
18 for example, what is toxic to the human body or
19 not?

20 **A. I leave that up to the medical examiners.**

21 **Q.** Okay. And the medical examiner in this
22 case -- did you ever speak to him or her?

23 **A. I did not.**

24 **Q.** All right. And we'll get back to that.

25 So what did you tell this representative

1 at the sheriff's office on October 14 regarding
2 what you could or couldn't do?

3 **A. I said I could look for volatiles and**
4 **report what I found. And that's, essentially, what**
5 **I told them.**

6 **Q.** Okay. And then the next entry that you
7 have in this case was October 21, 2009?

8 **A. There was one on the 15th where I just**
9 **told my supervisor about the phone call.**

10 **Q.** Okay. So let's move to October 21 where
11 there is some substance to that entry. What
12 happened on October 21, 2009?

13 **A. I spoke with a Ken Brewer from the**
14 **Yavapai County Sheriff's Office. I thought this**
15 **was the second time I talked to him, but apparently**
16 **he was not the first person I talked to. And he**
17 **asked about rocks being too big for cans to put**
18 **them in and how he could package them. I told him**
19 **he could use five-gallon buckets from a hardware**
20 **store and that I would need an extra bucket to**
21 **analyze to see if any volatiles came off the bucket**
22 **itself.**

23 **I also talked about wood used in the**
24 **fire, what temperatures I could heat those samples**
25 **to. I couldn't them get as hot as them burning.**

1 **And that's, essentially, what I told him -- or**
2 **talked to him about.**

3 **Q.** Okay. So on October 21, 2009, you spoke
4 with Ken Brewer from the Yavapai County Sheriff's
5 Office?

6 **A. Yes.**

7 **Q.** Did you know whether or not Mr. Brewer
8 worked with the case agent in this case --
9 Detective Ross Diskin?

10 **A. Originally when I talked to him, I**
11 **thought he was the first person I had talked to.**

12 **Q.** What do you mean? Who did you think --

13 **A. Like, I thought I had talked to Ken**
14 **originally.**

15 **Q.** All right.

16 **A. I didn't realize it wasn't him when I**
17 **talked to him because I didn't know the name of the**
18 **person I talked to originally.**

19 **Q.** Okay. Understand. At some point did you
20 learn that Mr. Brewer, working for the Yavapai
21 County Sheriff's Office, worked with
22 Detective Diskin in this case?

23 MR. HUGHES: Objection. Leading.

24 THE COURT: Overruled.

25 THE WITNESS: I did.

1 Q. BY MS. DO: All right. So on

2 October 21, 2009, looking up at the entry that you
3 wrote, you talked about the rocks?

4 A. Yes.

5 Q. And what specifically was said about the
6 wood?

7 A. That the wood might be from a log cabin
8 build. I said we could heat it and the rocks and
9 tarp, but I couldn't get it to the temperature that
10 the wood was at when it was burning.

11 Q. You wrote down there treated, in
12 parentheses, question mark; is that right?

13 A. Yeah. That was just something that went
14 through my mind. Was it treated? I did not know.

15 Q. Okay. And was that something that went
16 through your mind prompted by something that was
17 said by Mr. Brewer?

18 A. It was just a question I had when he told
19 me the wood might be from a log cabin build.

20 Q. Okay. Is that based upon any training or
21 experience that you've had previously?

22 A. It's just based on knowledge of how
23 houses are built or the wood used.

24 Q. That it might be treated?

25 A. That it could be.

1 Q. Okay. Now, you talked a little bit more
2 about the temperature while it would be burning.
3 Could you tell the jury why temperature is so
4 important in what you do.

5 A. When you're looking at volatiles, the
6 temperature at which you do your analysis will
7 depend on what you get out as a result. At a
8 higher temperature you will get more volatiles
9 typically, depending on your sample, than at lower
10 temperatures. And in this instance I wasn't going
11 to be able to get it to the temperature of wood
12 when it's burning.

13 Q. Why not?

14 A. Because there aren't ovens that we have
15 at the department that get that hot.

16 Q. Okay. Now, I'm going to move to the next
17 date that you have of October 29, which is the
18 second page of the exhibit.

19 MR. HUGHES: Objection, Your Honor. Pursuant
20 to Rule 106, she skipped passed the date on the
21 bottom of page 1, the entry for 10/27/09.

22 THE COURT: The exhibit is in evidence.

23 Could you show --

24 MS. DO: Sure, Your Honor.

25 THE COURT: Show that, Ms. Do, please.

1 MS. DO: All right.

2 Q. On October 27 -- I was focusing you on
3 the date in which you spoke to someone from the
4 sheriff's office.

5 On October 27, 2009, did you make an
6 entry?

7 A. I did.

8 Q. And what was that entry? If you want to
9 read it, you could.

10 A. I spoke with my supervisor, David Sperk,
11 and his supervisor, Vince Figerelli. They wanted
12 to know who the medical examiner was in this case.
13 Also I had learned from my supervisor that they
14 spoke with Ken on 10/23 of '09 and told him it was
15 okay to submit rocks as is in paper bags.

16 Q. Okay. Now, let's go back to the
17 October 29, 2009, entry, which is on the second
18 page. Did you speak to Ken Brewer again on that
19 date?

20 A. I did.

21 Q. And what was discussed on October 29?

22 A. That was when the evidence was brought to
23 the department. He told me that the medical
24 examiner was Fischione and -- for two of the
25 victims and that Coconino County did the

1 examination of the third victim. He had a question
2 about soil that was under the victims and whether
3 we could analyze it. I told him if we did, we
4 would need comparison samples that were -- from not
5 under the victims if we were going to analyze them.

6 Q. Who had a question about the soil
7 underneath the victims?

8 A. Ken asked me about it.

9 Q. Ken Brewer of the sheriff's office?

10 A. Yes.

11 Q. And did Mr. Brewer elaborate at all on
12 the question he had about the soil that was
13 underneath the victims in this case?

14 A. He may have, but I didn't note that.

15 Q. Did you ask him?

16 A. I may have, but, again, I didn't note it.
17 So I don't know what was said completely in regards
18 to that conversation.

19 Q. Okay. So on October 29, 2009, you hadn't
20 started any analysis; right?

21 A. Correct.

22 Q. And as we're going through your
23 communication logs, are you trying to collect
24 information from the sheriff's office before
25 beginning work?

1 **A. Yes.**
 2 **Q.** Okay. So on October 29, 2009, as you
 3 indicated, Mr. Brewer had a question about the
 4 soil?
 5 **A. Yes.**
 6 **Q.** And what did you tell him again?
 7 **A. That if we -- if we could analyze the**
 8 **soil, we would need comparison samples of soil that**
 9 **was from a different area than under the victims.**
 10 **Q.** In this entry there is a reference to a
 11 medical examiner by the name of Fischione?
 12 **A. Yes.**
 13 **Q.** Had you heard this name before this case?
 14 **A. Yes.**
 15 **Q.** Do you know who Dr. Fischione works for
 16 or what medical examiner's office?
 17 **A. The Maricopa County Medical Examiner's**
 18 **Office.**
 19 **Q.** Did you ever have any conversation with
 20 Dr. Fischione in this case?
 21 **A. I did not.**
 22 **Q.** To your knowledge, where did the
 23 communications go between with Dr. Fischione?
 24 **A. I don't have knowledge of where the**
 25 **communications went between him and someone else.**

1 **Q.** Okay. So you yourself simply never spoke
 2 to him?
 3 **A. That's correct.**
 4 **Q.** Okay. And then let's move along so that
 5 the jury understands the complete chronology of
 6 your case in here. On November 3rd, 2009, which is
 7 the next entry on the same page -- do you see that,
 8 Ms. Sy?
 9 **A. I do.**
 10 **Q.** And what was the entry about on
 11 November 3rd, 2009?
 12 **A. Again, I spoke with my supervisor and his**
 13 **supervisor. And they had questions whether we**
 14 **would be working the case or whether we would be**
 15 **sending the case out to the laboratory that was**
 16 **doing the toxicology.**
 17 **I was told to hold the analysis until one**
 18 **of them spoke with the medical examiner and that**
 19 **the Maricopa -- Maricopa County medical examiner,**
 20 **Dr. Fischione, was out all week.**
 21 **Vince Figerelli wanted a case synopsis**
 22 **and photos to determine how to proceed. And he had**
 23 **questions as to whether the wood had markings on**
 24 **it, whether it was pressure treated and could we**
 25 **source it to a manufacturer.**

1 **Q.** Who had questions about the wood on this
 2 date?
 3 **A. The central regional lab manager, Vince**
 4 **Figerelli.**
 5 **Q.** Who would be your boss?
 6 **A. He would be my boss's boss.**
 7 **Q.** Okay. So he is one more up?
 8 **A. Yes.**
 9 **Q.** And what was the question he had about
 10 the wood?
 11 **A. Whether it was pressure treated and could**
 12 **it -- it be sourced to a manufacturer.**
 13 **Q.** And this is a discussion that was had
 14 with you as a criminalist on this case; right?
 15 **A. He asked me if I knew these answers.**
 16 **Q.** Do you know where your boss's boss,
 17 Mr. Figerelli, received information, if he did,
 18 regarding pressure-treated wood?
 19 **A. I do not know.**
 20 **Q.** Okay. So then the next entry that you
 21 have -- well, let me go back to that so the jury
 22 can see. This is where you wrote, did the wood
 23 have markings? Was it pressure treated? Could we
 24 source it to a manufacturer?
 25 **A. Correct.**

1 **Q.** And when you were discussing the wood,
 2 both in the entry of October 21, '09, and
 3 November 03, '09, did you have an understanding of
 4 where the wood came from?
 5 **A. On the --**
 6 **Q.** What wood were you referring to when you
 7 talked about whether it was treated, on October 21,
 8 or whether it was pressure treated, on
 9 November 3rd?
 10 **A. The wood that was said to potentially be**
 11 **from a log cabin build.**
 12 **Q.** All right. And did you have any
 13 understanding of whether or not that was involved
 14 in the case regarding the accident or the incident
 15 that occurred on October 8th, 2009?
 16 **A. At this point I didn't have knowledge of**
 17 **exactly where it was from, which is why we asked**
 18 **for the case synopsis and my supervisor's**
 19 **supervisor asked for photos.**
 20 **Q.** Okay. And you did receive photos at some
 21 point?
 22 **A. We did.**
 23 **Q.** Let me refer you to the exhibit you have
 24 in front of you, page 1 of Exhibit 584. Let's look
 25 back at the entry of October 21, 2009.

1 **A. Okay.**
 2 **Q.** There did you write, he also asked about
 3 wood used in fire to heat rocks. Wood might be
 4 from a log cabin build, parentheses, treated,
 5 question mark?
 6 **A. Yes.**
 7 **Q.** Does that indicate to you where that wood
 8 that you referred to on October 21, '09, as being
 9 treated, question mark, November 3rd, '09, as being
 10 pressure treated came from?
 11 **A. Yes. It was the wood that was used to**
 12 **heat the rocks.**
 13 **Q.** All right.
 14 **A. Or that's what I was told.**
 15 **Q.** From Ken Brewer of the sheriff's office?
 16 **A. Correct.**
 17 **Q.** Now, when did you start your analysis in
 18 this case?
 19 **A. I started my analysis -- if I can refer**
 20 **to my notes?**
 21 **Q.** Please do.
 22 **A. On -- on the 20th of January 2010.**
 23 **Q.** Before you began your analysis, you had
 24 referred earlier to receiving some photographs?
 25 **A. Yes.**

1 **Q.** Did you receive it before you began your
 2 analysis?
 3 **A. I did.**
 4 **Q.** Do you know when you received it?
 5 **A. Again, this communications log, I**
 6 **received them on the 19th of November 2009.**
 7 **Q.** All right. So on November 19, 2009, you
 8 received, I presume from the sheriff's office,
 9 photographs of the scene?
 10 **A. That is correct.**
 11 **Q.** What else, if anything, did you receive?
 12 **A. I didn't receive anything else.**
 13 **Q.** Okay. Before you began your case work --
 14 I forgot my question.
 15 Before you began your analysis on
 16 January 20, 2010, had you received anything else
 17 from the sheriff's office other than scene
 18 photographs?
 19 **A. When the evidence originally came in, I**
 20 **received it directly from property in evidence to**
 21 **me. Then when I was told to wait to do the**
 22 **analysis based on we might send that evidence out,**
 23 **I returned the evidence to property -- our property**
 24 **in evidence department.**
 25 **Then on the 20th -- and actually, I think**

1 **it was before that -- I received the evidence again**
 2 **and did the analysis when I was told by my**
 3 **supervisors that I should do the analysis.**
 4 **Q.** You reference a date of January 20, 2010,
 5 from your analysis notes. I'm going to show you
 6 what's been marked as Exhibit 346. Is that the
 7 analysis notes you just referred to?
 8 **A. Yes.**
 9 **MS. DO:** Your Honor, Mr. Hughes is not
 10 objecting. We move that into evidence.
 11 **MR. HUGHES:** No objection, Your Honor, subject
 12 to putting a better copy of the back page in the
 13 exhibit.
 14 **THE COURT:** That's 346?
 15 **MS. DO:** Yes, Your Honor.
 16 **THE COURT:** That is admitted, and there will
 17 be a substituted page.
 18 (Exhibit 346 admitted.)
 19 **MS. DO:** Thank you.
 20 **Q.** Based upon your analysis notes,
 21 Exhibit 346, you began your analysis, meaning your
 22 testing, in this case on January --
 23 January 20, 2010; is that right?
 24 **A. That's correct.**
 25 **Q.** And when did you finish your testing?

1 **A. I finished it on February 3rd of 2010.**
 2 **Q.** When did you write a report, if you did
 3 at all, in this case?
 4 **A. On the 4th of February 2010.**
 5 **Q.** We'll get into the details of the results
 6 you found in your testing. But you just indicated
 7 you completed your test on February 3rd, 2010?
 8 **A. Correct.**
 9 **Q.** And so it took you 14 days in this case
 10 to do the testing?
 11 **A. It did. I had to order standards, and**
 12 **that took some time to get in and run them on the**
 13 **instrument.**
 14 **Q.** Okay. And then you wrote your report on
 15 February 4, 2010?
 16 **A. That's correct.**
 17 **Q.** Let me show you what's been conditionally
 18 admitted on April 29th, 2011. It is Exhibit 345.
 19 Is that a true and correct copy of your report?
 20 **A. It is.**
 21 **MS. DO:** Your Honor, at this time the defense
 22 requests that Exhibit 345 be moved into evidence.
 23 **MR. HUGHES:** No objection.
 24 **THE COURT:** 345 is now in evidence.
 25 (Exhibit 345 admitted.)

1 MS. DO: Thank you.

2 Q. And, Ms. Sy, and we'll get into the
3 details. But did you detect any volatiles in any
4 of the evidence items?

5 A. I did.

6 Q. Did you detect any specific chemicals on
7 any of the evidence items?

8 A. I did.

9 Q. And so those were your results on
10 February 3rd, 2010. Did you call either the county
11 attorney's office or the sheriff's office to
12 provide them with an oral report of what you had
13 found?

14 A. I did not. Our reports are mailed out to
15 the agencies.

16 Q. All right. So you wrote it in a written
17 report, which is Exhibit 345, and that's dated
18 February 4th?

19 A. Correct.

20 Q. What did you do with the report after
21 that?

22 A. It was mailed out. And that was the end
23 of it for me.

24 Q. Mailed out to whom? Do you know?

25 A. It would be mailed out to the Yavapai

1 County Sheriff's Office.

2 Q. Would it be directed to a particular
3 person?

4 A. It would be directed to the case officer
5 that submitted it.

6 Q. And in this case do you know who the case
7 officer is?

8 A. Officer Diskin.

9 Q. Have you met Diskin -- Detective Diskin
10 before?

11 A. I have.

12 Q. Do you see him in court?

13 A. I think that's him. Yes.

14 Q. Gentleman in the red shirt; right?

15 A. Yes.

16 Q. Okay. Now, February 3rd, 2010, when you
17 finished your test and you had detected volatiles
18 and specific chemicals, did you know whether or not
19 on February 3rd, 2010, the Yavapai County attorney
20 had obtained an indictment of Mr. Ray in this case?

21 A. I did not know whether they had or not.

22 Q. Okay. So the day that you actually
23 obtained positive results in your testing, that
24 information was never forwarded to the Yavapai
25 County Attorney or the sheriff's office on

1 February 3rd?

2 A. Can you repeat the question?

3 Q. Sure. When you received results on
4 February 3rd that volatiles and specific chemicals
5 were detected --

6 A. Yes.

7 Q. -- do you know whether or not you caused
8 that information to be transmitted to the county
9 attorney or the sheriff's office before Mr. Ray's
10 indictment?

11 A. I do not know when he was indicted or
12 the -- the sequence of events. I know my report
13 was mailed out.

14 Q. The very next day on February 4th?

15 A. I don't know what day it actually hit the
16 mail because it has to go through a technical
17 review and an administrative review before it is
18 released from our agency. So it would have been at
19 some point after that.

20 Q. Okay. So would there be a significant
21 delay after you've written the report before it's
22 mailed out?

23 A. It can be a week or two depending on how
24 long it takes someone to go through the entire
25 report and technically review it and then a second

1 person to go through and admin review it.

2 Q. Okay. And in this case you -- do you
3 have any idea how long after you wrote the report
4 that it was mailed out?

5 A. I do not. It's something that's tracked
6 in our LIMS or computer system, which could be
7 looked up. But I don't know what day it was.

8 Q. Okay. Since this request to test
9 evidence items came in from the Yavapai County
10 Sheriff's Office, would it be fair to presume that
11 they understood you were conducting this testing?

12 MR. HUGHES: Objection, Your Honor. Calls for
13 speculation and it's a leading question.

14 THE COURT: Sustained.

15 Q. BY MS. DO: At any time during your work
16 on this case -- for example, let's take it from
17 when you began the testing on January 20th, 2010,
18 to the time you finished 14 days later -- did you
19 ever receive a phone call or anything from the
20 sheriff's office to ask you about the results?

21 A. I did not.

22 Q. Anyone from the county attorney's office
23 call you while you were working on this case, their
24 case, to ask you about the results, if any?

25 A. No.

1 Q. I want to direct your attention to
2 Exhibit 345, to the second page. What is the last
3 line that is written on your report before your
4 signature?

5 A. It reads, if there are any questions
6 regarding this report, please contact the
7 undersigned criminalist.

8 Q. And who is the undersigned criminalist?

9 A. Me. Dawn Sy.

10 Q. And is that the signature block that we
11 now see up there with your phone number?

12 A. That is the general lab number so that
13 there is a secretary there to answer -- who would
14 put it through to me.

15 Q. Okay. Now, after you wrote your report
16 on February 4th, 2010, and then had that mailed out
17 to Detective Diskin at the sheriff's office, did
18 you ever receive a phone call from anyone at the
19 sheriff's office to ask you about the results?

20 A. I did not.

21 Q. Did you ever, after writing that report
22 on February 4, 2010, receive a phone call from the
23 county attorney's office prior to the start of
24 trial here in this case? Did you ever receive a
25 phone call from the county attorney's office to ask

1 you about the results?

2 A. Not about the results. I did receive a
3 phone call requesting an interview, a defense
4 interview.

5 Q. Okay. Let's go there. You received a
6 phone call from the county attorney's office?

7 A. I received an email from the county
8 attorney's office and then a request for notes,
9 which, again, may have been just in an email.

10 Q. Okay. And what -- and did you record
11 that in your communications log?

12 A. I have a copy of the email that was sent
13 to me as part of the overall packet. It's not in
14 the communications log. It's just a copy of the
15 email itself.

16 Q. Okay. Let's go back to your
17 communications log, 584. Looking at -- the last
18 entry you have on this case is May 10, 2010.

19 A. Yes.

20 Q. And what was the action or the events
21 that occurred on that date?

22 A. I received a request for notes from the
23 Yavapai County Attorney's Office. The notes, or a
24 copy of them, were placed in the U.S. mail on that
25 day.

1 Q. Do you know whether or not that request
2 from the county attorney was made pursuant to a
3 defense request for your notes?

4 A. If I can refer to the actual email, I can
5 tell you.

6 Q. Sure.

7 A. The email says that the attorney's office
8 has received a defense disclosure request for all
9 field and lab notes taken in regards to this case.

10 Q. And that occurred, as you noted, on
11 May 10, 2010?

12 A. I received the email on 5/6, May 6th,
13 of 2010.

14 Q. And then you mailed it out on May 10?

15 A. That's correct.

16 Q. Prior to receiving a request that
17 originated with the defense for your notes, did
18 anyone from the county attorney's office or the
19 sheriff's office ask you for your notes?

20 A. No.

21 Q. You mentioned that the next thing that
22 happened was an interview?

23 A. Correct.

24 Q. And do you know who asked for that
25 interview?

1 A. Again, it was a request by the defense.

2 Q. And did that interview take place?

3 A. It did.

4 Q. At that interview was Mr. Li, who's in
5 court, present?

6 A. Yes, he was.

7 Q. And was I the one present asking you
8 questions?

9 A. You were.

10 Q. And do you remember the date of that
11 interview?

12 A. I have it written down. It was the 17th
13 of June 2010.

14 Q. Prior to receiving a request to be
15 interviewed by the defense on June 17, 2010, were
16 you ever interviewed by the county attorney's
17 office regarding the results of your test?

18 A. I was not.

19 Q. Were you ever asked any questions or
20 interviewed by the sheriff's office about your
21 results?

22 A. I was not.

23 Q. I'm going to show you Exhibit 726 for
24 identification. Does that look like the transcript
25 of the interview that Mr. Li and I conducted of you

1 on June 17, 2010?

2 **A. It does.**

3 **Q.** Do you recall who else was present?

4 **A. I have that written down also. And**
5 **actually it's on the front. It was you, Mr. Li,**
6 **Steven Sisneros, and Detective Diskin.**

7 **Q.** And Steven Sisneros. Did you understand
8 that he was a deputy county attorney who worked for
9 Ms. Polk?

10 **A. I understand he was from their office.**

11 **Q.** Okay. Prior to seeing Detective Diskin
12 on June 17, 2010, had you ever met with
13 Detective Diskin on this case regarding your
14 results?

15 **A. I had not met with him.**

16 **Q.** Okay. And on that date of June 17, 2010,
17 you were gracious enough to give us some time, and
18 we asked you questions about this case?

19 **A. That's correct.**

20 **Q.** And do you recall me asking you
21 specifically some questions about the presence of a
22 chemical called "2-ethyl-1-hexonal"?

23 **A. Yes.**

24 **Q.** Before I asked you the question on
25 June 17, 2010, of what 2-ethyl-1-hexanol was, did

1 anyone from the state ask you what that chemical
2 was?

3 **A. No.**

4 **Q.** Let me move now forward into trial. You
5 are here testifying as a witness in this trial?

6 **A. Yes.**

7 **Q.** At any time while this trial was in
8 progress before this jury, did you ever receive a
9 phone call from the county attorney's office?

10 **A. I did.**

11 **Q.** And who called you?

12 **A. The county attorney, Sheila Polk.**

13 **Q.** Do you see Ms. Polk in court today?

14 **A. I think so, but I don't really know her.**
15 **I haven't met with her.**

16 **Q.** Also the lady in red?

17 **A. Yes.**

18 **Q.** Okay. And was anyone else on that phone
19 call with you other than Ms. Polk?

20 **A. I believe Detective Diskin was in on the**
21 **call, but I did not note it so I'm not positive.**

22 **Q.** All right. And do you remember when
23 approximately this phone call took place?

24 **A. It was sometime at the end of April, I**
25 **believe, or in April sometime.**

1 **Q.** Okay. I'm out of room on my sheet here,
2 but we're now into 2011. And you believe at the
3 end of April -- I'll leave that -- was the first
4 time you talked to Ms. Polk; is that right?

5 **A. Correct.**

6 **Q.** And you also spoke to Detective Diskin on
7 that date?

8 **A. I believe he was in on that conversation.**

9 **Q.** Do you know if that conversation was
10 audio recorded by anyone?

11 **A. I do not know.**

12 **Q.** Have you ever seen a report written by
13 Detective Diskin generated about your discussion,
14 your phone call, on this date at the end of
15 April 2011?

16 **A. I have not.**

17 **Q.** Did -- well, tell us what the
18 conversation was.

19 **A. From what I recall, the question had come**
20 **up as to whether I could have detected**
21 **organophosphates in the analysis -- the extraction**
22 **I had performed in this case.**

23 **Q.** Could you detect in your analysis the
24 presence of organophosphates?

25 **A. Correct.**

1 **Q.** Who asked you that question?

2 **A. Again, the county attorney, Sheila Polk.**

3 **Q.** And that occurred somewhere at the end of
4 April of 2011; is that right?

5 **A. Yes.**

6 **Q.** And, again, prior to that date, that
7 phone call, had you ever talked to Ms. Polk about
8 the results of your analysis?

9 **A. I had not.**

10 **Q.** Did either Ms. Polk or Detective Diskin
11 tell you what, if anything, prompted that question
12 posed to you almost four months into trial -- or
13 three months into trial rather?

14 **A. They did not say specifically.**

15 **Q.** Okay. But you do recall specifically the
16 question being about organophosphates?

17 **A. Yes.**

18 **Q.** And what did you tell them?

19 **A. I told them I did not know if my**
20 **extraction would allow me to detect an**
21 **organophosphate and that to know I would have to**
22 **test it. And organophosphates, there are quite a**
23 **number of them. And to know specifically I would**
24 **know -- need to know what specific one we were**
25 **looking for.**

1 Q. Okay. So based upon your training, your
2 experience, you did understand what
3 organophosphates were?

4 A. Yes.

5 Q. Could you tell the jury.

6 A. **Organophosphates are just organic
7 compounds containing a phosphorus molecule.
8 They're -- it's used in a number of things,
9 including insecticides or pesticides.**

10 Q. Okay. And on this date, the end of
11 April 2011 -- and by the way, did you know whether
12 or not Detective Diskin had testified to this jury
13 on April 29, 2011?

14 A. I do not know.

15 Q. Do you know if that phone call took place
16 before or after Detective Diskin was first
17 cross-examined by Mr. Kelly?

18 A. I don't know.

19 Q. All right. And the question posed to you
20 on that date was, did the test you ran on this case
21 that you started on January 20, 2010 -- is that the
22 test we were referring to?

23 A. Yes.

24 Q. Did that test -- could that test detect
25 the presence of organophosphates?

1 A. **That's what I was asked. Yes.**

2 Q. Okay. And you told Ms. Polk that you
3 didn't know?

4 A. **I did not know the answer to that. It
5 would be something I would have to test.**

6 Q. Explain that a little bit more so we can
7 understand.

8 A. **To know if my extraction specifically
9 would pick up an organophosphate, if the instrument
10 I used had the ability or sensitivity to detect it,
11 I would actually have to test it using the method I
12 used to test the items of evidence in this case and
13 see what I -- I got as a result. But I would need
14 to know specifically what organophosphates you were
15 looking for because it's a very broad class of
16 compound.**

17 Q. Okay. In this case you'd already told
18 the jury that the request was a request for
19 volatiles; is that right?

20 A. Correct.

21 Q. So the -- and we'll get into a little bit
22 more details so the jury understands what test you
23 actually ran. The test you actually ran was not
24 designed to look for organophosphates?

25 MR. HUGHES: Objection. Leading question.

1 THE COURT: Overruled.

2 You may answer that.

3 THE WITNESS: Can you repeat the question?

4 Q. BY MS. DO: Sure. The test you ran in
5 this case, was it designed to detect the presence
6 of organophosphates?

7 A. **No, it was not.**

8 Q. And that was the question Ms. Polk posed
9 to you at the end of April 2011?

10 A. **She posed could the extraction I did
11 detect an organophosphate.**

12 Q. And you told her?

13 A. **I did not know the answer to that
14 question.**

15 Q. And at some point did you further
16 research that question?

17 A. **I looked up to see how organophosphates
18 are tested.**

19 Q. Okay. Now, do you have any idea whether
20 or not that information you gave to Ms. Polk was
21 then provided to the defense in this case?

22 A. **I do not know.**

23 Q. And, again, have you ever seen a report
24 memorializing that conversation with you and
25 Ms. Polk and Detective Diskin?

1 A. **I have not.**

2 Q. Sometime after that conversation you had
3 with Ms. Polk and Detective Diskin at the end of
4 April, were you contacted by the county attorney's
5 office regarding your appearance as a witness in
6 this case?

7 A. **I was.**

8 Q. And do you remember who that was?

9 A. **A Kathy Durrer, I believe.**

10 Q. Kathy Durrer?

11 A. **Yes.**

12 Q. Do you know whether or not Ms. Durrer
13 works -- I see her. Do you know if this is
14 Ms. Durrer in the back there?

15 A. **Yes.**

16 Q. Okay. And Ms. Durrer contacted you by
17 telephone?

18 A. **Yes. I also spoke to a Penny Cramer. So
19 I'm not sure which one of those contacted me
20 originally.**

21 Q. All right. Were they contacting you on
22 behalf of Ms. Polk?

23 A. **Yes.**

24 Q. Okay. So originally were you subpoenaed
25 by the state?

1 **A. I was.**

2 **Q.** To testify as a witness in their case in
3 chief?

4 **A. I was.**

5 **Q.** After you spoke to Ms. Polk and
6 Detective Diskin at the end of April 2011 about
7 whether or not your test could detect the presence
8 of organophosphates, were you told whether you were
9 needed anymore?

10 **A. Yes. I was told to show up here on a
11 specific date.**

12 **Q.** Okay. And did you show up?

13 **A. I did.**

14 **Q.** And what date was that?

15 **A. It was -- I would have to actually look
16 at a calendar. It was a Friday, the first week in
17 May. Friday.**

18 **Q.** And you came from Phoenix?

19 **A. I did.**

20 **Q.** Is that a long drive?

21 **A. It's about an hour and a half.**

22 **Q.** Okay. So you actually got to this
23 courthouse. And when you got here, did you know
24 whether or not trial was in progress in front of
25 the jury?

1 **A. I knew that trial was in progress.**

2 **Q.** Okay. And when you got here, did you
3 speak to either Ms. Polk or Mr. Hughes?

4 **A. I spoke with Mr. Hughes briefly on that
5 day.**

6 **Q.** About what?

7 **A. Just that he was delayed in calling me.
8 I don't remember exactly what we talked about. I
9 also received at that point a copy of -- or a
10 transcript -- a copy of the transcript of my
11 interview with you.**

12 **Q.** Okay. The one that you have in front of
13 you?

14 **A. Yes.**

15 **Q.** Were you ultimately called that --

16 **A. I was not called on that day.**

17 **Q.** Okay. Now, after you appeared -- you
18 drove an hour and a half from Phoenix up to Camp
19 Verde. And after your conversation with Ms. Polk
20 and Detective Diskin, were you told whether or not
21 you needed to appear anymore?

22 That was a bad question. Let me ask you
23 it again.

24 **A. Okay.**

25 **Q.** After you drove from Phoenix to Camp

1 Verde, did you receive another phone call from the
2 county attorney's office about appearing for trial?

3 **A. I actually called the -- I had gone on
4 vacation for two weeks, a little under two weeks.
5 So when I got back from vacation, I called the
6 county attorney's office to find out if I was going
7 to be needed during that week. They said they
8 would still be having people testify during that
9 week. And at that point I found out I was not
10 going to be needed.**

11 **Q.** Do you remember what date it was that you
12 returned from vacation?

13 **A. I returned on the 21st of May. So I
14 would have called the week after that. That's a
15 Sunday. I would have called sometime after that.**

16 **Q.** Okay.

17 **A. The next week.**

18 **Q.** And when you called, did you understand
19 whether or not the state was still in trial?

20 **A. I didn't know when I made the phone call,
21 but I understood that they would be based on the
22 conversations before I had left.**

23 **Q.** And what were you told about coming in to
24 testify in the state's case in chief?

25 **A. I was told I was not going to be needed.**

1 **Q.** Were you told why?

2 **A. Just that they were wrapping up their
3 case.**

4 **Q.** Anything else?

5 **A. Just that they weren't going to need me.**

6 **Q.** Okay. Do you recall in a very brief
7 conversation with me telling me that the state told
8 you they needed to trim down their witness list
9 because the case had gone on too long?

10 **A. They said they were not going to use me
11 because they were conduding their case. So --**

12 **Q.** All right.

13 **A. -- if that's how I said it to you, yes.**

14 **Q.** Well, I don't want to put words in your
15 mouth. Did you say that to me? Do you remember,
16 Ms. Sy?

17 **A. I don't recall what my exact words were.**

18 **Q.** Okay. So towards the end of April 2011,
19 you received a question about whether or not your
20 analysis would detect organophosphates, and
21 subsequent to that you were released from the
22 state's subpoena?

23 **A. I don't --**

24 **MR. HUGHES:** Object to compound nature of the
25 question.

1 THE COURT: Sustained.

2 Q. MS. DO: Okay. My question is -- is --
3 is -- I didn't mean to have it be compound. It's
4 very simple. You were released from the state's
5 subpoena to appear as a witness?

6 A. **I was told I was not going to be needed**
7 **but that I was still under the order not to watch**
8 **any television or read anything regarding this case**
9 **because I may be used at a later date.**

10 Q. I appreciate that. And you have not;
11 correct?

12 A. **I have not.**

13 Q. So you're here pursuant to a defense
14 subpoena?

15 A. **Correct.**

16 Q. The defense in this case subpoenaed you
17 to testify in front of this jury about your
18 analysis and your results?

19 A. **That's correct.**

20 Q. And if I understand correctly, at the
21 beginning of my discussion with you, you work for
22 the State of Arizona --

23 A. **I do.**

24 Q. -- that Ms. Polk represents?

25 A. **I work for the State of Arizona.**

1 Q. Okay. Do I have the chronology, then, of
2 your casework and your communications -- or lack of
3 communications with the state correct as we see up
4 on the easel?

5 A. **The chronology is correct.**

6 Q. Okay. Now, you had told the jury
7 earlier -- and by the way, have you ever met a
8 doctor named Dr. Matthew Dickson?

9 A. **I have not.**

10 Q. Were you aware that Dr. Matthew Dickson
11 testified or provided testimony about your test and
12 your analysis?

13 A. **I have no knowledge of that.**

14 Q. Okay. Did Dr. Dickson ever call you to
15 talk to you about your analysis and results before
16 offering any testimony in that regard?

17 A. **He did not.**

18 Q. Okay. You had told the jury earlier that
19 you do not have the training and the expertise to
20 tell a case agent whether any particular substance
21 is toxic to the human body. Do you remember that?

22 A. **That's correct.**

23 Q. Your analysis in this case is to see if
24 there were volatiles. And if there were, you would
25 report it out?

1 A. **Correct.**

2 Q. In this particular case, at some point
3 after you received the request from the sheriff's
4 office, did you understand what the potential
5 charges were?

6 A. **There was a charge listed on the request**
7 **form.**

8 Q. And what was that?

9 A. **Homicide.**

10 Q. So based upon that charge on the request
11 form, did you understand that there was a death
12 involved?

13 A. **Yes.**

14 Q. At least one death?

15 A. **Yes.**

16 Q. Did you know if there was more?

17 A. **Based on the communications I received**
18 **from the Yavapai County Sheriff's Office, I knew**
19 **that there were three deaths.**

20 Q. Okay. So based upon the charge and
21 understanding there were three deaths in this case,
22 did you understand that your request to analyze
23 this test in any way was to assist in the
24 cause-of-death investigation?

25 A. **It was my understanding that that's what**

1 **I would be doing. I just told them what I could do**
2 **and I reported out my findings. What's done with**
3 **it after that I don't know.**

4 Q. What would you have expected to happen
5 with your results after you reported it out?

6 A. **I honestly don't have expectations of**
7 **what happens after I report something out. I send**
8 **it out, and that is the end until someone asks me a**
9 **question about it.**

10 Q. Okay. So if you -- if someone wanted to
11 understand whether something you found is toxic to
12 the human body, what would they have to do with
13 your results?

14 A. **They could call me, and I would tell them**
15 **I don't have an answer for them on that. I would**
16 **tell them to ask a medical examiner, ask someone --**
17 **a toxicologist, someone who would have knowledge of**
18 **that.**

19 Q. So either a medical examiner or a
20 toxicologist?

21 A. **There could be other people. Those are**
22 **the people I would recommend they talk to.**

23 Q. And in this case did you yourself forward
24 your report to the medical examiners?

25 A. **I did not.**

1 Q. Did you ever receive a call from any
2 medical examiner in this case?
3 A. I have not.
4 Q. Okay. Now, let me move you forward to
5 the actual testing you've done in this case. In
6 order to do it, you received some evidence items
7 from the sheriff; correct?
8 A. Correct.
9 Q. And did you take notes of what you
10 received?
11 A. I did.
12 Q. Is that reflected in Exhibit 346?
13 A. It is.
14 Q. Okay. Let's use your notes so that
15 it's -- it's -- it's accurate. Can you tell this
16 jury how many boxes of evidence items you received
17 in total?
18 A. I received 12 tape-sealed boxes.
19 Q. And that was on October 29, 2009?
20 A. I actually received it on a different
21 day. I believe I received it on the 12th. I
22 started my analysis on the 20th.
23 Q. Of January?
24 A. Of January -- oh. Sorry. You said 2009
25 and I heard --

1 Q. That's okay. Can you tell the jury when
2 it was that you received 12 tape-sealed boxes of
3 evidence in this case.
4 A. I originally received evidence but did
5 nothing with it in 2009 on the day it came into our
6 laboratory. And then from -- a couple of weeks
7 later returned it because we didn't know if we were
8 going to do the analysis. I can tell you exactly
9 what day that it was. It was on the 29th of
10 October 2009 that I -- I received the evidence.
11 And then I returned it on the 19th of
12 November 2009.
13 Q. And then I presume that you received it
14 back?
15 A. I received it back in 2010 and then did
16 the analysis.
17 Q. When in 2010?
18 A. I believe it was the 12th of
19 January 2010. I started my analysis on the 20th of
20 January 2010.
21 Q. Okay. Among the 12 tape-sealed boxes,
22 did you receive any rocks?
23 A. I did.
24 Q. How many did you receive?
25 A. Samples of rock -- let me count them.

1 Sorry.
2 THE COURT: Ms. Do, would you remove the
3 exhibit.
4 MS. DO: Yes, sir.
5 THE COURT: There's not a pending question.
6 Thank you.
7 THE WITNESS: I received nine samples of rock.
8 Q. BY MS. DO: You received nine rocks. And
9 how many of those nine did you test?
10 A. I tested two of them.
11 Q. When you receive evidence from -- in this
12 case it was Yavapai County Sheriff's Office -- do
13 the evidence items come with you with a number
14 already designated?
15 A. Yes, they do.
16 Q. And that's to control the chain of
17 custody?
18 A. Yes. And track the items.
19 Q. Okay. Could you tell the jury of the two
20 that you tested what the rocks were assigned as
21 numbers?
22 A. Item No. 305 and item No. 345.
23 Q. The item number, the rock that is
24 designated 305, were you told where that came from?
25 A. 305, according to the request form, was

1 from the center of the outside fire pit.
2 Q. The second rock. Was that item No. 345?
3 A. Correct.
4 Q. And were you told where that rock came
5 from?
6 A. It was from the pit inside the sweat
7 lodge.
8 Q. Okay. What did you do with the other
9 seven rocks that you didn't test?
10 A. I just noted how they were packaged, and
11 I did nothing with them. I received them but
12 didn't analyze them.
13 Q. The items you didn't analyze -- were they
14 returned?
15 A. They were returned to our property in
16 evidence department.
17 Q. Did you receive any paint cans with
18 crosscuts of what was noted by you to be tarps and
19 materials?
20 A. Yes.
21 Q. How many paint cans did you receive?
22 A. I received four.
23 Q. Of those four, how many did you test?
24 A. I tested two.
25 Q. I'm going to show you what's been marked

1 demonstratively as 899 to 902. And when you open
2 up an evidence item that's been sealed, do you do
3 anything to indicate that you yourself have opened
4 it?

5 **A. I do. I put our department of records**
6 **number, the date, and my initials on each item of**
7 **evidence. And then when I return it, I reseal it**
8 **back up and put my initials and date across the**
9 **seal.**

10 **Q.** Okay. And looking at those four paint
11 cans, looking for your initials, are those the
12 paint cans you received and tested two of them?

13 **A. Yes, they are.**

14 **Q.** And of two that you tested, what was the
15 evidence item that came with them?

16 **A. I tested items 356 and 358. They were**
17 **cans containing pieces of material, cloth, or tarp.**

18 **Q.** Did you receive anything labeled or
19 described as "D logs"?

20 **A. D logs?**

21 **Q.** Yes. Or logs.

22 **A. I received things that were called**
23 **"sample from logs."**

24 **Q.** How many did you receive?

25 **A. Four samples.**

1 **Q.** Of those four samples, how many did you
2 actually test?

3 **A. I tested two.**

4 **Q.** And what were the two that you tested in
5 terms of their evidence item numbers?

6 **A. Item No. 500 and item No. 502.**

7 **Q.** Did you receive anything called "upright
8 poles" to test?

9 **A. I did.**

10 **Q.** And how many did you receive?

11 **A. Four.**

12 **Q.** How many of the four did you test?

13 **A. Again, I tested two.**

14 **Q.** And what were the evidence items for
15 those two?

16 **A. Items 562 and 564.**

17 **Q.** Okay. So everything that you didn't test
18 you returned unanalyzed?

19 **A. That's correct.**

20 **Q.** Including two of the paint cans that
21 contained tarps and materials?

22 **A. Correct.**

23 **Q.** The test that you ran, you were asked to
24 look for toxic volatiles at certain temperatures?

25 **A. Yes.**

1 **Q.** And what was the actual equipment or
2 machine that you used?

3 **A. I used a gas chromatograph mass**
4 **spectrometer.**

5 **Q.** And that's also known in short as GCMS?

6 **A. Correct.**

7 **Q.** Could you tell the jury in simple terms
8 how you run that test and how it's conducted.

9 **A. In this instance I took the can**
10 **containing the tarp, the pieces of wood, I heated**
11 **them up to a specific temperature with a charcoal**
12 **strip, just a little piece of, basically, paper**
13 **that's made out of carbon in it. I heat it for a**
14 **specific amount of time, eight hours in this**
15 **instance.**

16 **I then take that charcoal strip out. I**
17 **put solvent on it to wash anything that had**
18 **collected on that strip off. And then I inject it**
19 **on the GCMS and I look at the results that come off**
20 **from the instrument and write a report as to those**
21 **results.**

22 **Q.** Okay. Let me try and go back to the
23 basics a little bit. The materials you received
24 obviously were solids?

25 **A. Correct.**

1 **Q.** And so you're heating it at a certain
2 temperature to see if the solid would release
3 anything in vapor form or -- or gas form?

4 **A. Correct.**

5 **Q.** And the carbon strip that you put in the
6 paint can, I understand, would collect whatever is
7 released at that temperature?

8 **MR. HUGHES:** Object to the leading nature.

9 **THE COURT:** Overruled.

10 **Q.** BY MS. DO: Is that correct?

11 **A. The carbon strip would -- would -- would**
12 **collect the volatiles.**

13 **Q.** Okay. That's released from the actual
14 evidence items?

15 **A. Yes.**

16 **Q.** Then what do you do with that carbon
17 strip?

18 **A. I take that carbon strip, I put a solvent**
19 **on it to wash off whatever is collected on the**
20 **strip and then put it on our instrument and analyze**
21 **what's in that solvent sample.**

22 **Q.** How does the solvent collect the
23 volatiles that's released from the evidence?

24 **A. At this point what happens is the stuff**
25 **that's on the carbon strip is attached. But when**

1 you put the solvent on, the stuff that's attached
2 to the strip likes the solvents a little better, so
3 it goes into the solvent. So then I take that
4 solvent and run it and see what's in it.

5 Q. Okay. And a solvent is what? A liquid?

6 A. It's just a liquid.

7 Q. It absorbs the volatiles that is attached
8 to the carbon strip?

9 A. Essentially, washes them off.

10 Q. Okay. And then what do you with the
11 solvent now that it's absorbed or taken in the
12 volatile?

13 A. I take that solvent sample, and it is
14 injected on the gas chromatograph mass
15 spectrometer, GCMS. From that a chromatogram is
16 produced. I look at that chromatogram and I issue
17 a report based on what's found.

18 Q. Okay. And how does the GCMS -- does the
19 GCMS machine tell you what chemical compound or
20 what volatile it is that you managed to release
21 from the evidence item?

22 A. What happens on a GCMS is that gas
23 chromatograph portion, the GC portion, it separates
24 things that are in there based, basically, on
25 weight. Things that are heavier take longer to go

1 through a long tube, if you will. It's just a long
2 coated straw.

3 It then goes to the mass spec detector.
4 It breaks it apart. It -- the computer then takes
5 the data from that and puts it in a chromatogram
6 form. I look at that chromatogram based on what it
7 looks like and standards that I run. I know what
8 specific compound it is.

9 Q. What is a chromatogram?

10 A. The chromatogram is just sort of a
11 chemical fingerprint of the breaking apart of the
12 compound as it goes into the detector.

13 Q. Okay. So based on this process, you're
14 able to identify what the chemical or the volatile
15 is?

16 A. Actually, I need to correct myself. You
17 said chromato -- I said chromatogram. You said
18 chromatogram. It's the mass spectrum.

19 Q. Oh. It is?

20 A. It's the breaking apart of the compound.

21 Q. Based upon that, you're able to identify
22 the chemical?

23 A. Yes.

24 Q. I just went on the internet yesterday
25 just to see what a GCMS equipment looks like.

1 Showing you what's been marked for identification
2 as 1082, for demonstrative purposes, is that what a
3 GCMS equipment looks like?

4 A. Yes.

5 Q. Is it similar to what you use?

6 A. It is similar.

7 Q. Now, you indicated that you heated the
8 evidence items at a temperature. Was it more than
9 one temperature?

10 A. I heated it at two separate temperatures.

11 Q. And what were those temperatures?

12 A. 50 degrees Celsius and 95 degrees
13 Celsius.

14 Q. Do you know how to convert the Celsius to
15 Fahrenheit?

16 A. I do.

17 Q. Okay. So 53 degrees Celsius is what?

18 A. It is 120 -- approximately 122 degrees
19 Fahrenheit.

20 Q. And 95 degrees Celsius is what in
21 Fahrenheit?

22 A. Approximately 202 degrees or 203 degrees
23 Fahrenheit.

24 Q. And how long do you heat up the evidence
25 items for at those two temperatures?

1 A. I heated them eight hours.

2 Q. And why eight hours?

3 A. Eight hours just so it would have time to
4 get to the temperature. Something like a rock
5 takes longer to get to the 50 degrees or certainly
6 longer than that to get to the 95 degrees Celsius.
7 And I needed time for any of the volatiles to get
8 up into that head space and collect on the charcoal
9 strip.

10 Q. Okay. The photograph I showed you of a
11 GCMS, Exhibit 1082 -- would that help the jurors
12 understand what your equipment looks like?

13 A. It would.

14 MS. DO: Your Honor, at this time I move for
15 the admission of 1082.

16 MR. HUGHES: No objection.

17 THE COURT: 1082 is admitted.

18 (Exhibit 1082 admitted.)

19 Q. BY MS. DO: Let me just show the jury
20 so -- is that what a GCMS test equipment look like?

21 A. Yes.

22 Q. Okay. We have already explained that
23 you're looking for volatiles. Can you tell this
24 jury whether this test you ran was looking for a
25 specific volatile or was it a nonspecific test?

1 **A. This was a nonspecific test just looking**
 2 **at what volatiles would come off at the specific**
 3 **temperatures I tested at. It would look for a**
 4 **whole range of things.**

5 **Q.** Okay. And is this a kind of test that
 6 you would run in the arson cases that you work?

7 **A. This is the exact extraction I use in**
 8 **arson cases.**

9 **Q.** Looking for accelerants?

10 **A. Yes.**

11 **Q.** Now, the temperatures that you tested
 12 at -- the 122 degrees Fahrenheit and the 203
 13 degrees Fahrenheit -- how did you arrive at those
 14 figures?

15 **A. I asked the Yavapai County Sheriff's**
 16 **Office to tell me what temperatures I should test**
 17 **at based on what temperatures it was at the sweat**
 18 **lodge and write that down. On the request form**
 19 **they wrote 120 degrees Fahrenheit and 200 degrees**
 20 **Fahrenheit, so I tested at the nearest Celsius**
 21 **because all of lab stuff is done in Celsius, not**
 22 **Fahrenheit.**

23 **Q.** Okay. And why did you want to replicate
 24 the temperature inside the sweat lodge ceremony to
 25 run your test?

1 **A. You would want to know what temperature**
 2 **it was in the sweat lodge so that you heated the**
 3 **samples to that temperature to determine what would**
 4 **come off at the temperature it was at in the sweat**
 5 **lodge.**

6 **Q.** So if you heated it at a temperature
 7 lower than what it was, in fact, in the sweat lodge
 8 ceremony, you might get chemicals that weren't
 9 there at the scene?

10 **A. You might get less chemicals than were**
 11 **there at the actual sweat lodge.**

12 **Q.** Okay. And then the -- the flip side of
 13 that question is if you heated it at a higher
 14 temperature -- to get that question right -- a
 15 higher temperature than in a sweat lodge ceremony,
 16 you might get --

17 **A. More volatiles than were actually**
 18 **present.**

19 **Q.** Okay. So it's temperature dependent?

20 **A. It is.**

21 **Q.** Now, you said that you asked the
 22 sheriff's office what temperature they believed it
 23 was inside the sweat lodge?

24 **A. I did.**

25 **Q.** And they told you?

1 **A. They put on the request form 120 and 200**
 2 **degrees Fahrenheit.**

3 **Q.** Now, if the case agent testified -- and
 4 this is a hypothetical. If the case agent
 5 testified to this jury in this case that he, in
 6 fact, did not know how hot it was in the sweat
 7 lodge ceremony, does that affect in any way the
 8 significance of your test using the temperatures
 9 provided to you?

10 **A. It could.**

11 **Q.** Could you explain to the jury.

12 **A. If the temperature was higher then, say,**
 13 **the lowest temperature I tested at, the 50 degrees**
 14 **Celsius, you might see more volatiles coming off,**
 15 **which may have an effect on people. I -- I don't**
 16 **know. It may affected what was actually in the**
 17 **sweat lodge. If it was lower than what I tested**
 18 **at, the volatiles that I found might not have been**
 19 **present at that temperature.**

20 **Q.** Okay. So if the detective was guessing
 21 at the temperatures inside the sweat lodge
 22 ceremony, it may or may affect -- may or may not
 23 affect the significance of what you found or the
 24 accuracy of your test?

25 **A. It wouldn't affect the accuracy of what I**

1 **found. It would affect what it potentially meant**
 2 **to the case.**

3 **Q.** Okay. Now, let me move into your actual
 4 results. Did you test the rock from the center of
 5 the fire pit, exhibit -- or evidence item 305, and
 6 the rock from the fire pit inside the sweat lodge,
 7 evidence item 345, at 50 degrees Celsius?

8 **A. I did.**

9 **Q.** Did you also test 356 and 358, the two
 10 cans containing the material and tarp, at 50
 11 degrees Celsius?

12 **A. I did.**

13 **Q.** And the two samples, evidence items 500
 14 and 502, of the D log or the logs?

15 **A. I did.**

16 **Q.** And the upright pole samples, evidence
 17 562 and 564?

18 **A. Again, yes, I did.**

19 **Q.** Looking at your report, which has been
 20 marked Exhibit 345, are these the reports -- the
 21 results you reported out for all those evidence
 22 items at the temperature of 50 degrees Celsius?

23 **A. Yes, they are.**

24 **Q.** Okay. And that, again, is 122 degrees
 25 Fahrenheit?

1 **A. Yes.**
 2 **Q.** You indicated that at that temperature on
 3 those evidence items, you found no volatiles
 4 detected on 305. And that would be a rock?
 5 **A. Correct.**
 6 **Q.** No volatiles on 345. And that would be
 7 another rock from the fire pit inside the sweat
 8 lodge?
 9 **A. Correct.**
 10 **Q.** 358, which is one of the two pieces of
 11 material tarp that you tested?
 12 **A. Correct.**
 13 **Q.** 502, which is one of the D log samples?
 14 **A. Yes.**
 15 **Q.** And 562 and 564, the upright poles?
 16 **A. That's correct.**
 17 **Q.** Okay. So at 50 degrees nothing was
 18 released in its gas form from those evidence items?
 19 **A. Nothing that I detected.**
 20 **Q.** Okay. You did find at that temperature
 21 trace amounts of a chemical called
 22 "2-ethyl-1-hexanol"; correct?
 23 **A. Correct.**
 24 **Q.** For short, is that also referred to as
 25 2-EH?

1 **A. I've seen it that way.**
 2 **Q.** Also, a chemical called "2-Ethylhexyl
 3 acetate," both of those being found on item 356?
 4 **A. Correct.**
 5 **Q.** And item 356 is the can containing the
 6 materials and the tarp?
 7 **A. Yes.**
 8 **Q.** Okay. I'm going to return back to those
 9 chemicals in just a moment. You also found
 10 detected on 500, which is a log, trace amounts of
 11 alpha-terpineol and -- how do you pronounce the
 12 next thing because it's got a symbol in it?
 13 **A. It's negative terpene for all. Again,**
 14 **it's just chemical shorthand for a compound.**
 15 **Q.** Okay. Could you tell the jury what those
 16 two chemicals were that you found on the log.
 17 **A. They are terpene as a general class of**
 18 **char -- of compound.**
 19 **Q.** What's terpene?
 20 **A. Terpene is just an aromatic product**
 21 **typically found in wood samples.**
 22 **Q.** Okay. So not surprising?
 23 **A. Not surprising.**
 24 **Q.** Now, I'm going to go back to your
 25 communications log, if you will, and look at the

1 entry that you had on October 21, 2009. You had
 2 indicated that on October 21, 2009, and
 3 November 3, 2009, you had questions prompted about
 4 whether the wood was pressure treated or treated.
 5 Do you remember that?
 6 **A. Yes.**
 7 **Q.** Can you tell the jury what chemical or
 8 compound is used to treat wood, if you know?
 9 **A. I do not know. There are probably**
 10 **multiple things that could be used to treat wood.**
 11 **Q.** Have you ever heard of a compound called
 12 "copper chromium arsenate," CCA?
 13 **A. I've heard of it.**
 14 **Q.** Okay. Do you know whether or not those
 15 are heavy metals?
 16 **A. It is.**
 17 **Q.** Okay. The GCMS test that you ran to
 18 detect volatiles -- is it also designed to detect
 19 heavy metal such as copper chromium arsenate?
 20 **A. It is not.**
 21 **Q.** Okay. So if you had questions about
 22 whether or not the wood used to heat the fire -- to
 23 heat the rocks were treated with any kind of
 24 chemicals, like copper chromium arsenate, this test
 25 that you ran would not detect or exclude the

1 presence of that?
 2 **A. That is correct.**
 3 **Q.** Now, going back to your test result
 4 again, the Exhibit 345, you then heated everything
 5 at the second temperature given to you by the
 6 sheriff's office of 95 degrees Celsius, and you
 7 found volatiles detected on everything; is that
 8 right?
 9 **A. That is correct.**
 10 **Q.** And is that what we're looking at on the
 11 screen now?
 12 **A. Yes.**
 13 **Q.** When you say volatiles were detected on
 14 all of those items at that temperature, can you
 15 tell the jury what kind of volatiles?
 16 **A. Some of the volatiles that were detected**
 17 **at the lower temperature were detected plus a whole**
 18 **host of other things were detected.**
 19 **Q.** Okay. When you say "a whole host," can
 20 you tell the jury approximately how many other
 21 volatiles were detected.
 22 **A. I would have to count them up, but**
 23 **anywhere from 25 to 50 per sample.**
 24 **Q.** And are you able to identify those
 25 specifically?

1 **A. I potentially could go through every**
 2 **single one of the things that were detected and**
 3 **identify them, but I would have to purchase**
 4 **standards for each of them to determine what they**
 5 **were. And some of them, if they were too low a**
 6 **quality and I could not find a good match for them,**
 7 **I would not be able to tell you what they are.**

8 **Q. Okay. What -- and what is a standard so**
 9 **the jury knows what we're talking about?**

10 **A. A standard is just a purchased, known**
 11 **compound purchased from a chemical manufacturer.**

12 **Q. Okay. So in the second temperature with**
 13 **all of the evidence items -- the rocks, the wood,**
 14 **the materials, and the tarp -- you detected a whole**
 15 **host of volatiles, but we just don't know what in**
 16 **that class?**

17 **A. I didn't report out what they were, and I**
 18 **didn't try to identify everything that was there.**

19 **Q. But you could if someone asked?**

20 **A. I could go through and potentially**
 21 **identify everything that was there.**

22 **Q. Has anyone from the state or the**
 23 **sheriff's office ever asked you to try and**
 24 **identify?**

25 **A. Not that I recall. No.**

1 **Q. Okay. Now, let's return to what you**
 2 **found in trace amounts on the materials and tarps**
 3 **contained in the paint can, evidence item 356. You**
 4 **found something called "2-ethyl-1-hexanol"?**

5 **A. Yes.**

6 **Q. You found something called "2-Ethylhexyl**
 7 **acetate"?**

8 **A. Yes.**

9 **Q. So those are two separate chemicals that**
 10 **you found in trace amounts on that evidence item?**

11 **A. That's correct.**

12 **Q. Can you tell the jury what trace amount**
 13 **is.**

14 **A. It's just a small amount.**

15 **Q. Okay. Did you understand -- you received**
 16 **four samples that were cross-sections of the**
 17 **materials and tarps?**

18 **A. Yes.**

19 **Q. Do you know what percentage those four**
 20 **samples represented of the entire materials and**
 21 **tarps used to cover the sweat lodge ceremony?**

22 **A. I don't know what percentage it is.**

23 **Q. If I -- if I gave you the hypothetical**
 24 **that in this trial the jury has heard that the four**
 25 **paint cans are less than 1 percent, do you have any**

1 **reason to dispute that?**

2 **A. I don't.**

3 **Q. Okay. So in this case you tested**
 4 **samples, obviously, that you believed to be**
 5 **representative?**

6 **A. Representative of the whole, yes.**

7 **Q. Okay. But obviously you didn't test the**
 8 **whole?**

9 **A. Correct.**

10 **Q. 2-Ethylhexyl acetate. Can you tell the**
 11 **jury what that is?**

12 **A. It's just a -- a chemical compound.**

13 **Q. What do you normally see that in?**

14 **A. It's seen in paints and coatings industry**
 15 **it's used.**

16 **Q. Okay. And when you say you found these**
 17 **two chemicals in trace amounts, are you in any way**
 18 **suggesting that they were found together or were**
 19 **they just distinct chemicals found in your testing?**

20 **A. They're just chemicals I found in my**
 21 **analysis.**

22 **Q. Okay.**

23 **A. They're not necessarily together.**

24 **Q. The 2-ethyl-1-hexanol, going back to the**
 25 **June 17, 2010, interview that Mr. Li and I**

1 **conducted of you, did I ask you what that was on**
 2 **that date?**

3 **A. Yes, you did.**

4 **Q. In the presence of Detective Diskin?**

5 **A. Yes.**

6 **Q. And a deputy who worked for Ms. Polk?**

7 **A. Yes.**

8 **Q. What did you tell me on that date**
 9 **2-ethyl-1-hexanol could be found in?**

10 **A. I said it could be found in plastics and**
 11 **polymers.**

12 **Q. Is that a common thing to be found in?**

13 **A. It is.**

14 **Q. On that date do you remember telling me**
 15 **if it was found in anything else?**

16 **A. I do not recall that I said anything**
 17 **else.**

18 **Q. Okay. After our interview on**
 19 **June 17, 2010, did you at any time do additional**
 20 **research to find out -- let me finish the**
 21 **question -- to find out whether or not**
 22 **2-ethyl-1-hexanol is found in any other products**
 23 **other than plastics?**

24 **A. I did.**

25 **Q. And before I ask you what it's found in,**

1 can you tell the jury what 2-ethyl-1-hexanol is,
 2 what kind of compound it is?
 3 **A. It's an alcohol.**
 4 **Q.** So it's in the chemical class of alcohol?
 5 **A. Correct.**
 6 **Q.** And do you know what it's used as in
 7 these various products, including plastics or
 8 plasticizers?
 9 **A. It's a solvent used in them. Again, as**
 10 **a --**
 11 **Q.** What does a solvent do to something like
 12 in a plastic or plasticizer?
 13 **A. It's used to help form the plastic in --**
 14 **in whatever shape or form it's going to take.**
 15 **Solvents are used in a number of things.**
 16 **Q.** Okay. Now, you knew on June 17 that you
 17 had seen 2-ethyl-1-hexanol used in plastics and
 18 plasticizers. Was that surprising to you given
 19 that you were looking at tarps?
 20 **A. It was not.**
 21 **Q.** Okay. After that interview with Mr. Li
 22 and myself, you then looked up what else
 23 2-ethyl-1-hexanol could be used in?
 24 **A. Correct.**
 25 **Q.** And what did you learn?

1 **A. I learned it could be used in food**
 2 **products. It could be used as a solvent or carrier**
 3 **in pesticides. It could be used in a number of**
 4 **other things. It was in a lot of things as a**
 5 **solvent.**
 6 **Q.** Okay. So let's go through that. You had
 7 mentioned that you learned it's used in food and
 8 beverages?
 9 **A. Yes.**
 10 **Q.** Do you know what it's used as?
 11 **A. I believe it's as a flavor enhancer.**
 12 **Q.** All right. And you also indicated that
 13 you found that it was used in pesticides?
 14 **A. Yes.**
 15 **Q.** What's it used as in pesticides?
 16 **A. Just as a solvent carrier for the**
 17 **pesticide itself.**
 18 **Q.** What does that mean? What would it do?
 19 **A. It makes the pesticide liquid, if it's**
 20 **not liquid, so that you could spray it on**
 21 **something.**
 22 **Q.** Okay. So 2-ethyl-1-hexanol -- first of
 23 all, do you know if it's an inert, inactive, or an
 24 active ingredient?
 25 **A. In what?**

1 **Q.** In pesticides.
 2 **A. From what I've read, it's inactive.**
 3 **Q.** Can you tell the jury what it means to be
 4 inactive.
 5 **A. Meaning it's not the thing that's going**
 6 **to stop the bugs from attacking the plant or**
 7 **whatever it's -- it's put on.**
 8 **Q.** So it's not the active ingredient or the
 9 thing that will kill the bug or the plant?
 10 **A. Correct.**
 11 **Q.** You indicated to the jury that it's used
 12 in the solvent to make things spray a little
 13 easier?
 14 **A. Yes.**
 15 **Q.** So in pesticides, based upon your
 16 research and your knowledge, is 2-ethyl-1-hexanol
 17 used as a solvent to make pesticide sprayable?
 18 **A. As far as I know, yes.**
 19 THE COURT: Ms. Do, it's been 90 minutes. If
 20 we can take a break.
 21 MS. DO: Yes, Your Honor. Thank you.
 22 THE COURT: Ladies and gentlemen, we will take
 23 the afternoon recess at this time. Please be
 24 reassembled in 15 minutes, at ten till.
 25 And I just want to remind Ms. Sy that, of

1 course, the rule of exclusion is invoked in this
 2 case.
 3 THE WITNESS: Okay.
 4 THE COURT: Thank you. We will be in recess.
 5 (Recess.)
 6 THE COURT: Please be seated. Thank you.
 7 The record will show the presence of
 8 Mr. Ray, the attorneys, the jury. Ms. Sy has
 9 returned to the witness stand.
 10 Ms. Do.
 11 MS. DO: Thank you, Your Honor.
 12 **Q.** Ms. Sy, just a few more areas to cover
 13 with you. Before we took that break we were
 14 talking about what products 2-ethyl-1-hexanol might
 15 be found in, and we covered a few. You mentioned
 16 plastic and plasticizers?
 17 **A. Yes.**
 18 **Q.** And you've also mentioned pesticides?
 19 **A. Yes.**
 20 **Q.** So we covered the entire area. Do you
 21 know what the other products are that you might
 22 find 2-ethyl-1-hexanol in?
 23 **A. I also said food products can contain it.**
 24 **I could look up more, but those are the things that**
 25 **I recall offhand seeing.**

1 Q. Do you know whether or not it could be
2 found in coating materials?

3 A. **It is a solvent. So yes. It could be**
4 **found in that sort of stuff.**

5 Q. Adhesives?

6 A. **Yes.**

7 Q. Okay. If you have the presence of
8 2-ethyl-1-hexanol and you -- you know that it is a
9 chemical that can be used as a solvent for plastics
10 or plasticizers --

11 A. **Yes.**

12 Q. -- from an evidentiary standpoint, as a
13 criminalist, would that 2-ethyl-1-hexanol be
14 considered hypothetically as a marker for the
15 presence of plastics or plasticizers?

16 A. **It wouldn't be unexpected to find it if I**
17 **had a plastic or a plasticizer or something with a**
18 **plasticizer in it.**

19 Q. Okay. And so the jury understands, when
20 I use the word "marker," do you understand it to
21 mean that 2-ethylhex -- 2-ethyl-1-hexanol might
22 mean that a particular product is present?

23 A. **It would not necessarily mean that**
24 **because other solvents could be used.**

25 Q. I understand that there's a range of

1 products that it's used for as a solvent. What I'm
2 asking is, hypothetically, if you know,
3 2-ethyl-1-hexanol is used in the product of
4 plastics or plasticizers?

5 A. **Yes.**

6 Q. Okay. As a criminalist would it be a
7 possibility that the 2-ethyl-1-hexanol, the
8 presence of it, would suggest the presence of
9 plastics or plasticizers?

10 A. **It could come from that. It could come**
11 **from something else. And not all plastics have to**
12 **use 2-ethyl-1-hexanol.**

13 Q. Okay. So if you found 2-ethyl-1-hexanol,
14 knowing that it's also used in coating materials,
15 could you as a criminalist also conclude that it's
16 possible that it came from coating materials?

17 A. **It could be. You would have to test to**
18 **find out.**

19 Q. Okay. Further testing?

20 A. **Correct.**

21 Q. And in this case you've already testified
22 to the jury that 2-ethyl-1-hexanol is commonly used
23 as a solvent in pesticides to make it sprayable?

24 A. **Correct.**

25 Q. So using that same logic, as a

1 criminalist could you conclude that possibly the
2 presence of 2-ethyl-1-hexanol is a marker for
3 pesticides?

4 A. **Again, it could be used in a pesticide,**
5 **so that could be where it came from.**

6 Q. Okay. Do you know whether -- and only if
7 you know, whether or not 2-ethyl-1-hexanol itself,
8 the chemical itself, is toxic to the human body?

9 A. **From what I've read, I don't know the**
10 **exact toxicity. However, it's not listed as a**
11 **toxic chemical.**

12 Q. Okay. And I don't think anyone would
13 disagree with you. But the presence of
14 2-ethyl-1-hexanol, as you've already said, could be
15 a marker for the presence of pesticides?

16 A. **It could be.**

17 Q. And going back to we -- what we talked
18 about earlier, you said that pesticides commonly
19 contain organophosphates?

20 A. **They can. Yes.**

21 Q. Do you know whether or not
22 organophosphates is toxic to the human body?

23 A. **They can be. Yes.**

24 Q. And the question Ms. Polk asked you on
25 that phone call at the end of April was whether or

1 not your test in this case could have detected the
2 presence of pesticides, specifically
3 organophosphates; correct?

4 A. **She asked me about organophosphates.**
5 **Yes.**

6 Q. And your answer in this case to that
7 question would be?

8 A. **My answer to what question?**

9 Q. Whether your test could detect the
10 presence of organophosphates.

11 A. **I do not know.**

12 Q. Are there tests that you can run to
13 detect the actual presence, not a marker like
14 2-ethyl-1-hexanol, but the actual presence of the
15 organophosphate compound?

16 A. **There are tests, yes, for them.**

17 Q. And what kind of tests are those?

18 A. **You can do solvent extractions. The EPA**
19 **methods I've seen that test for organophosphates**
20 **typically use a solvent extract, and they run on a**
21 **different instrument than the one I used.**

22 Q. Okay. And in this case you didn't do a
23 solvent extraction?

24 A. **I did not.**

25 Q. You did a volatile extraction?

1 **A. Correct.**

2 **Q.** What's a solvent extraction? Can you
3 tell the jury.

4 **A. Essentially, you take whatever you think**
5 **the organophosphate, the pesticide, is on or in and**
6 **you put solvent on top of it, take that solvent and**
7 **then analyze it using some sort of instrumentation.**

8 **Q.** Do you know whether or not that test is
9 accurate?

10 **A. I've never performed that test. So it**
11 **would probably be dependent on the lab, the person**
12 **who performed the test, what controls they used.**

13 **Q.** Okay. Are there GCMS tests that run for
14 the presence of organophosphates in soil samples?

15 **A. Again, the -- the testing procedures that**
16 **I've seen do not use the GCMS. It may be possible**
17 **to use the GCMS to detect them. You would have to**
18 **know specifically what organophosphates you were**
19 **looking for and you would have to try it to see if**
20 **that specific instrument had detectability on it,**
21 **whether it was sensitive enough to organophosphates**
22 **to use.**

23 **Q.** Okay. So from your answer, is it fair to
24 say that the GCMS that you ran, the test you ran in
25 this case, was not sensitive enough to pick up on

1 organophosphates?

2 **A. I do not know if it is. I have not tried**
3 **to.**

4 **Q.** In this case you made some reference in
5 your casework or the chronology about soil?

6 **A. Yes.**

7 **Q.** I'm going to go back to that for a
8 moment. On October 29, 2009, you had a question
9 there about soil; correct?

10 **A. Ken Brewer asked me a question about**
11 **soil. Yes.**

12 **Q.** In this case did you ever receive any
13 soil samples?

14 **A. I did not personally.**

15 **Q.** Are you -- do you know whether or not
16 soil samples were submitted to the DPS labs in any
17 one of the four that you mentioned earlier?

18 **A. They were submitted to the Flagstaff lab,**
19 **and then they were returned to the Yavapai County**
20 **Sheriff's without analysis.**

21 **Q.** Okay. So, to your knowledge, soil
22 samples collected in this case have never been
23 tested?

24 **A. That is the knowledge I have. Yes.**

25 **Q.** Okay. So assuming hypothetically that

1 this jury has heard the sheriffs on October 9

2 collected four samples of the soil inside the sweat
3 lodge, a scoop of soil from inside the pit, and a
4 scoop of dirt from outside the fire pit, you never
5 personally tested any of those items?

6 **A. I did not.**

7 **Q.** To your knowledge, did anyone in the DPS
8 lab test any of those items?

9 **A. There was not a report issued by DPS.**

10 **Q.** All right. When this question came up
11 from Ken Brewer of the sheriff's office on
12 October 29, you told him that you needed comparison
13 samples?

14 **A. Correct.**

15 **Q.** And is that because you either personally
16 at the DPS lab could have conducted the test or you
17 could have referred it out?

18 **A. One of the two options. Yes.**

19 **Q.** Okay. So on October 29 you asked
20 Mr. Brewer to collect comparison samples?

21 **A. Yes. I said if -- if analysis was going**
22 **to be performed, we'd need to know what would be in**
23 **the soil normally, what is found in it, as compared**
24 **to what was found in the soil underneath the**
25 **victims is what I wrote. I didn't know there were**

1 **other samples collected.**

2 **Q.** Okay. And do you know whether or not
3 after you told Mr. Brewer that you would need
4 comparison samples to run this test whether any was
5 collected?

6 **A. I do not know.**

7 **Q.** Okay. Assuming hypothetically that this
8 jury has heard that comparison samples were taken
9 from Angel Valley on October 30th, 2009, were you
10 ever personally provided with comparison samples?

11 **A. I've not received any of the samples in**
12 **this case --**

13 **Q.** Okay.

14 **A. -- of the soil I should say.**

15 **Q.** Now, when we spoke -- I think it might
16 have been just yesterday to let you know you needed
17 to be here at 1:30.

18 **A. Yes.**

19 **Q.** Okay -- or 12:30 rather. I asked you if
20 there were any tests that you could perform on soil
21 samples for the presence of pesticides. Do you
22 remember that?

23 **A. We talked about stuff. I -- I don't**
24 **remember exactly what we said.**

25 **Q.** Okay. Do you know whether or not, and

1 using your words, there are tried and true -- tried
2 and true methods to test soil samples for the
3 presence of pesticides?

4 **A. There are methods out there.**

5 **Q.** And so if on October 29, 2009, someone
6 told you we want to test the soil samples for the
7 presence of toxins or pesticides, what would you
8 have done?

9 **A. I would have had to refer that -- that**
10 **case out because pesticides is not something we**
11 **typically look for. We don't have the equipment**
12 **that is typically used in that sort of analysis.**

13 **As far as toxins, again, to do an**
14 **analysis you need to know what you're looking for**
15 **to start out with or at least know what class of**
16 **compounds you're looking for. So that's a very**
17 **broad category.**

18 **Q.** Okay. Let's put the toxins aside, then.
19 The organophosphates. Is there a molecule or a
20 commonality among all the different
21 organophosphates out there?

22 **A. They all contain phosphorus.**

23 **Q.** Okay. And so are there a, to your
24 knowledge, if you know, a common category of
25 organophosphates that are typically seen in

1 pesticides?

2 **A. There may be. I don't know all the**
3 **organophosphates that are used in pesticides.**

4 **Q.** Okay. So if someone wanted to look for
5 organophosphates in soil samples, they could
6 provide what are commonly found in pesticides?

7 **A. They could do testing for them. Yes.**

8 **Q.** Okay. So I want to go back to this
9 chronology. On October 21, 2009, and November 3rd,
10 there were questions in your casework about treated
11 wood?

12 **A. There were questions that we generated in**
13 **the lab, me personally, and my supervisor's**
14 **supervisor.**

15 **Q.** Okay. And I want you to also assume
16 hypothetically the jury has heard from
17 Detective Diskin that there may have been evidence
18 on October 8 about questions regarding the wood
19 used. Okay?

20 **A. Okay.**

21 **Q.** Now, assuming that, your GCMS test, as
22 you told the jury, would not have detected or
23 excluded the presence of copper chromium arsenate,
24 the heavy metals that are use to treat wood;
25 correct?

1 **A. Correct.**

2 **Q.** The soil samples, the question you had on
3 October 29 and the question Ms. Polk had at the end
4 of April 2011 regarding organophosphates, the GCMS
5 test you ran was not designed to detect or
6 eliminate the presence of organophosphates?

7 **A. It would not be the best method to use.**
8 **I don't know what it would detect in regards to**
9 **organophosphates or what it would be able to**
10 **detect, I should say.**

11 **Q.** So, as you sit here, are you able to tell
12 the jury with any confidence that the test you ran
13 in this case eliminated the presence of
14 organophosphates or pesticides?

15 **A. I cannot.**

16 **Q.** And so it took you 14 days, from
17 January 20th to February 3rd, 2010, to conduct your
18 tests and complete it?

19 **A. That's correct.**

20 **Q.** So you could have -- could you have done
21 your tests in those 14 days in the month of October
22 if it was requested?

23 **A. I could have.**

24 **Q.** Okay. And so if you were asked to do the
25 testing immediately, say, the day after the

1 accident, and came up with the result of
2 2-ethyl-1-hexanol, someone could have asked you
3 what 2-ethyl-1-hexanol is found in?

4 **A. They could have. I should say it did**
5 **come into the laboratory long before I actually**
6 **analyzed it. It was a laboratory decision not to**
7 **analyze it right away.**

8 **Q.** I understand. But if there was a push
9 from the requesting agency -- for example, on
10 October 9, 2009, if the sheriff's office said --
11 you know -- we have one person who's in the
12 hospital on life support and we have two deceased,
13 we need to know, how would the lab would have --
14 how would the lab have responded?

15 **A. I don't know how management would have**
16 **responded. But typically when high-profile cases**
17 **and cases that involve death come in, we work them**
18 **as soon as we can if possible.**

19 **Q.** Okay. So because you were able to do it
20 in 14 days, I would assume that there were no
21 resources or any reasons why you couldn't have done
22 those 14 days in the month of October?

23 **A. I probably could have. Yes.**

24 **Q.** Okay. So if the testing had been done in
25 the month of October '09, you would have been able

1 to report out the presence of 2-ethyl-1-hexanol?

2 **A. I would have just reported it out**
3 **earlier.**

4 **Q.** Okay. And if someone reading your report
5 called you and asked you what are all the things
6 that are found with 2-ethylhex --
7 2-ethyl-1-hexanol, you would have provided the
8 answer you gave to this jury?

9 **A. Correct.**

10 **Q.** Including plastics and plasticizers?

11 **A. Yes.**

12 **Q.** And pesticides?

13 **A. Yes. Among other things, yes.**

14 **Q.** Among other things. So if in

15 October 2009 someone had seen the marker
16 2-ethyl-1-hexanol and thought possibly pesticides,
17 the questions regarding the soil samples could have
18 been addressed in October 2009?

19 **A. Yes. Potentially it could have if they**
20 **knew organophosphates were something that they**
21 **wanted to test for.**

22 **Q.** Okay. And if they knew that
23 organophosphates was something that they could have
24 tested for, you personally, as a criminalist,
25 wouldn't have had any reason to not send it out to

1 a lab that was qualified to do the testing?

2 **A. I personally wouldn't. But that would**
3 **have been a management decision that I wouldn't**
4 **have made. It would have been made above me.**

5 **Q.** I understand that. So what I'm asking
6 you this is, Ms. Sy, if there was a push to have
7 done the test immediately in October of 2009 and
8 your results that were reported out of

9 2-ethyl-1-hexanol, there could have been an
10 opportunity in October of 2009 to have sent the
11 soil samples out in a timely fashion for testing?

12 **A. They could have been sent out sometime**
13 **after that. Yes.**

14 **Q.** We're now about 17, 18 months since the
15 accident on October 8th, 2009. To this day do you
16 know whether or not the soil samples collected from
17 the scene of these deaths have ever been tested?

18 **A. I do not know.**

19 MS. DO: Thank you, Your Honor. I have
20 nothing further.

21 THE COURT: Thank you, Ms. Do.

22 Mr. Hughes.

23 MR. HUGHES: Thank you, Your Honor.

24
25 ///

1 CROSS-EXAMINATION

2 BY MR. HUGHES:

3 **Q.** Good afternoon, Ms. Sy.

4 **A. Good afternoon.**

5 **Q.** Do you have some of the exhibits in front
6 of you?

7 **A. I do.**

8 **Q.** Do you mind if I take those from you
9 temporarily. I'd like to put them on the overhead.
10 It looks like you brought copies; is that correct?

11 **A. Of my report, yes.**

12 **Q.** Okay. Now, you were asked some questions
13 by Ms. Do about decisions to test. Do you -- in
14 which department do you work in at the DPS when
15 these samples were submitted?

16 **A. I worked in the trace analysis unit.**

17 **Q.** Okay. And do you know whether it's
18 common for detectives in cases to submit large
19 number of items to the lab for testing?

20 **A. It does happen. Yes.**

21 **Q.** And is it common for your lab to test
22 everything that's submitted?

23 **A. In some instances we do test everything.**
24 **In some instances we do not test everything. We**
25 **typically try and leave at least half of the sample**

1 **for reanalysis or defense analysis.**

2 **Q.** And is it common when an -- when an
3 officer submits multiple samples in a case that you
4 would -- assuming there were two of each thing so
5 the defense can test and you can test each thing,
6 is it common that you would test at least one of
7 each thing if the detectives ask?

8 **A. If detectives ask and they were different**
9 **items of evidence, yes, we would test one of each.**

10 **Q.** Are there cases where you would tell the
11 detective that either your supervisor or your lab
12 doesn't have the resources to test everything that
13 gets submitted?

14 **A. There are instances where that has**
15 **happened.**

16 **Q.** And do you know how commonplace that is
17 for both yourself and other criminalists?

18 **A. I can say for myself it's not as common,**
19 **but I don't do as many cases as other people.**
20 **For other analysts I can't tell you how common it**
21 **is.**

22 **Q.** And I think Ms. Do asked you and you said
23 you'd worked at the lab for about 16 1/2 years?

24 **A. That's correct.**

25 **Q.** Have you during those 16 1/2 years had

1 cases submitted to you from agencies all over the
2 state?

3 **A. I have.**

4 **Q.** And the DPS also?

5 **A. Yes.**

6 **Q.** Have you ever had a case submitted to you
7 where you were asked to look for organophosphates?

8 **A. No, I have not.**

9 **Q.** I think you indicated that your
10 instrument that you use, this GCS, is not the best
11 instrument for checking for organophosphates. Is
12 that correct?

13 **A. It's a GCMS. And I do not know how**
14 **sensitive the instrument is. I haven't tested it.**
15 **However, I have looked up methods for the analysis**
16 **of organophosphates, and it is not the instrument**
17 **used.**

18 **Q.** Would you need a known standard for that
19 organophosphate to look for?

20 **A. I would.**

21 **Q.** And explain, if you would, how when
22 you're testing you need to have a -- what a known
23 standard is and how that factors into a test.

24 **A. When I analyze something using a GCMS or**
25 **some other instrument, what I end up doing is**

1 **comparing it to a known sample of what I think it**
2 **is. It has to have the same properties, the same**
3 **mass spectrum if I'm using a GCMS, and it must be**
4 **purchased from a known source.**

5 **Q.** Now, when you insert -- you used a
6 syringe to insert the chemical into the GCMS?

7 **A. It actually is an auto sampler, but it**
8 **uses a syringe. Yes.**

9 **Q.** Okay. They used to use syringes about 15
10 to 20 years?

11 **A. And they still do. It's just -- it's**
12 **done by the instrument instead of me.**

13 **Q.** Okay. When you -- when you insert that
14 chemical into the GCMS, does the name of the
15 compound pop up on the computer screen?

16 **A. It does not. You can search it versus a**
17 **library of purchased -- library of known spectrum.**
18 **You can compare it to it. And then based on that**
19 **library search, you can purchase a standard, run it**
20 **on your instrument using the parameters you used,**
21 **do a comparison of it, and determine whether that's**
22 **the compound.**

23 **Q.** And is that comparison something that you
24 do visually?

25 **A. Yes.**

1 **Q.** And when you insert a sample, then, into
2 the GCMS, what prints out, if you will, on the
3 computer screen or on your printer?

4 **A. A copy of the chromatogram, how the peaks**
5 **were separated, how many peaks are there,**
6 **essentially, how many compounds come off in a**
7 **specific sample and then a spectrum of each of**
8 **those peaks that you choose to look at.**

9 **Q.** I'm going to show you what's been
10 admitted now as Exhibit 346. And I've kind of
11 randomly turned to one of the pages, Bates 4055.
12 Does that show what a -- what one of these
13 printouts would look like?

14 **A. Yes, it does.**

15 **Q.** And can you explain, then, for -- let me
16 see if I can focus that.

17 Can you explain what -- how on this
18 particular printout you would try and determine
19 what sort of chemical is represented by the -- the
20 printout that's there.

21 **A. There are two peaks that you're seeing in**
22 **that printout. Below the two peaks is a spectrum**
23 **of one of those peaks.**

24 **Q.** And is that this thing down here?

25 **A. Yes.**

1 **Q.** Okay.

2 **A. The top portion represents the gas**
3 **chromatogram portion. It's just separating things**
4 **out based on their weight. The bottom spectrum,**
5 **the mass spectrum, is what it looks like when you**
6 **break it apart. The fragments, if you will, the**
7 **mass fragments of the compound, as it breaks apart.**

8 **Q.** And what do these individuals numbers,
9 then, mean that are shown at the top of the peaks
10 on top -- on the top chart and the bottom chart?

11 **A. The numbers on the bottom chart just**
12 **represent the weight of the pieces of the broke**
13 **apart compound. Basically, you compare that to a**
14 **known spectrum. You look at all of those little**
15 **lines with the numbers on it and compare it -- and**
16 **compare it to a known spectrum. The top you get a**
17 **retention time, how long it took to come out of the**
18 **coded column I talked about.**

19 **Q.** And is that, then, how you would
20 determine, for example, that this -- this chemical,
21 2-ethyl-1-hexanol, was present in the sample that
22 you tested?

23 **A. Yes.**

24 **Q.** Now, with respect to known samples, let's
25 say hypothetically if there -- if there was no

1 organophosphate that was used, how would you know
2 what sample to purchase from the lab to try and see
3 if you had it?

4 **A. You wouldn't know. If there was no -- if**
5 **you didn't do an analysis that gave you something**
6 **that you thought was an organophosphate, that you**
7 **didn't detect it, you couldn't know which**
8 **organophosphate to purchase.**

9 **Q.** Now, you were asked some questions about
10 the communications log, which has been admitted as
11 Exhibit 584, and I noted in here there's some
12 mentions to someone named Sperk?

13 **A. That's correct.**

14 **Q.** And can you tell who Sperk is?

15 **A. That's David Sperk. He is -- he was my**
16 **supervisor, the supervisor in the trace analysis**
17 **unit.**

18 **Q.** And then there's also some references to
19 this Figerelli. Who's Mr. Figerelli?

20 **A. That is Vince Figerelli. He is my boss's**
21 **boss -- or was my boss's boss.**

22 **Q.** Do you know whether -- you were asked
23 whether you had had any communications with the
24 medical examiners or YCSO. Do you know whether
25 Mr. Sperk or Mr. Figerelli may have?

1 **A. I was told my supervisor, Dave Sperk,**
2 **that he talked to Fischione, the medical examiner.**

3 **Q.** Now, you were asked some questions about
4 Fischione and -- does he also work in Maricopa
5 County?

6 **A. Yes, he does.**

7 **Q.** And what's his title in Maricopa County?

8 **A. He is medical examiner. I don't know his**
9 **exact title.**

10 **Q.** Do you know if he's the chief medical
11 examiner of Maricopa County?

12 **A. He may be, but I don't know.**

13 **Q.** And do you know whether he's the chief
14 medical examiner in Yavapai County?

15 **A. Again, he may be, but I don't know.**

16 **Q.** And does these communications logs
17 reflect any notes from Mr. Sperk or Mr. Figerelli
18 about their conversations?

19 **A. It does not.**

20 **Q.** At some times, though, did they inform
21 you, hey, I've spoken to, for example, the medical
22 examiner?

23 **A. Yes. And when they said that to me, I**
24 **noted it.**

25 **Q.** In fact, did you note that, for example,

1 on Bates 4633 at the top here, that Mr. Sperk has
2 spoken with Fischione but Figerelli wants to set up
3 conference call?

4 **A. Yes.**

5 **Q.** Do you know whether they had additional
6 conversations with anyone that may not have been
7 reflected in the communications log?

8 **A. I do not know.**

9 **Q.** Do they typically keep you in the loop if
10 they would have a conversation with a case officer
11 or medical examiner?

12 **A. Sometimes they do, sometimes they do not.**

13 **Q.** Is -- is it your job to call up your boss
14 or your boss's boss and ask them what they've been
15 up to on a case you're working on?

16 **A. No.**

17 **Q.** Okay. Now, on some of these notes you
18 were -- you -- for example, you were asked a
19 question about the very first entry, this 10/4
20 entry here.

21 And let me see if I can zoom in a little
22 bit.

23 **A. 10/14?**

24 **Q.** I'm sorry. 10/14. Says, spoke with
25 representative from YCSO. And do you -- who do you

1 believe that representative is?

2 **A. Now I believe it was Detective Diskin.**
3 **Originally I believed it was Ken Brewer.**

4 **Q.** And I know a number of these notes
5 mention Ken by name. Do you have any doubt that on
6 those occasions you spoke with Ken Brewer?

7 **A. I do not.**

8 **Q.** Do you know what Ken Brewer does for
9 YCSO?

10 **A. He is in charge of their evidence.**

11 **Q.** Do you know whether he takes an active
12 role in actually investigating cases?

13 **A. I do not know.**

14 **Q.** Would it surprise you if he didn't?

15 **A. It would surprise me.**

16 **Q.** Do you deal with evidence techs from --
17 technicians from other departments also?

18 **A. Yes. When items of evidence are being**
19 **submitted, sometimes we deal with them.**

20 **Q.** And then turning to the 10/14 notation,
21 it indicates that you spoke with the YCSO
22 representative about the lodge, and he asked
23 whether we could test the rocks and tarp to
24 determine if toxic volatiles were released. Do you
25 know whether Detective Diskin used the term "toxic

1 volatiles"?

2 **A. I believe he -- I believe he did.**

3 **However -- I mean, that's what I wrote down that he**
4 **asked for. But I may have paraphrased what he had**
5 **asked for.**

6 **Q. Do you try and make a running transcript,**
7 **if you will, of everything that people say or --**
8 **what's the purpose behind these notes?**

9 **A. The purpose of these notes is just to**
10 **help tell me what types of analysis I'm going to**
11 **do, what things are most important, and what**
12 **information I have released to people.**

13 **Q. Now, you were asked some -- a question**
14 **and in -- on this location it indicates that the**
15 **wood was -- it says "treated" with the question**
16 **mark. And I believe you told the jury that was**
17 **your thought that was going through your head?**

18 **A. That was just my thought.**

19 **Q. Okay. Given that thought, when you**
20 **ultimately did test the wood samples that were**
21 **submitted, did you consider testing them for any --**
22 **any sort of treating chemicals?**

23 **A. I did not.**

24 **Q. And why is that?**

25 **A. It's not something I've every tested for.**

234

1 **So it's somewhat outside the purview of what I**
2 **normally test for. We could have been asked to do**
3 **it, and I would have suggested who could analyze it**
4 **or maybe what could be done. But this was just a**
5 **thought in my head. And I did exactly what I was**
6 **asked to do on the request form.**

7 **Q. Okay. And what did the request form --**
8 **do you have the request form with you?**

9 **A. I do.**

10 **Q. And can you -- can you tell us what it**
11 **was that was asked of you on the request form. And**
12 **if you could show me the form. Yeah. I think**
13 **that's the -- that's the one that we're going to**
14 **put the new page in because it's too faint to read**
15 **on ours.**

16 **Can you tell us what it is you were asked**
17 **to do on the request form.**

18 **A. It says, please test all the items to**
19 **determine if any vapors, fumes, gases, et cetera,**
20 **are produced at temperatures between 120 degrees**
21 **Fahrenheit and 200 degrees Fahrenheit.**

22 **Q. And when you -- when you read that, did**
23 **that -- did you take that, then, that it -- it**
24 **didn't include treatments that you would treat wood**
25 **with to keep it from rotting?**

1 **A. That's what I was asked to do on these**
2 **items. So that's what I did. I -- I did not go**
3 **further than that.**

4 **Q. Okay. With respect, then, on your report**
5 **to the vapors and whatnot, the chemicals that were**
6 **released, you tested the wood at two different**
7 **temperatures?**

8 **A. I did.**

9 **Q. And the temperatures were 50 degrees**
10 **Celsius?**

11 **A. Correct.**

12 **Q. And that was the Celsius number for the**
13 **Fahrenheit number that the sheriff's department gave**
14 **you; correct?**

15 **A. As close as I could get to it. Yes.**

16 **Q. Okay. And then the other number that you**
17 **tested was 95 degrees Celsius?**

18 **A. That's correct.**

19 **Q. And I believe 95 degrees Celsius is about**
20 **203 degrees Fahrenheit?**

21 **A. Correct.**

22 **Q. Okay. And what temperature is the**
23 **temperature when water actually begins to boil?**

24 **A. 212 degrees Fahrenheit.**

25 **Q. So if I had a -- a cup of water and I**

236

1 **wanted to get this cup of water up to a nice**
2 **rolling boil, what temperature would I heat the**
3 **water to?**

4 **A. Over 212 degrees Fahrenheit.**

5 **Q. Can water -- unless you're putting it**
6 **under pressure, can water heat up above 212**
7 **degrees?**

8 **A. The vapor can probably get hotter than**
9 **that. The water itself probably cannot.**

10 **Q. Okay. So when the water -- for any of us**
11 **who cook spaghetti, for example, and to get the**
12 **water boiling, the water itself when the big**
13 **bubbles are rolling, that water is 212 degrees?**

14 **A. The water is. The actual steam above it**
15 **or vapor above it can get hotter.**

16 **Q. And in this case you heated -- with**
17 **respect to the second set of testing, you heated to**
18 **5 degrees Celsius or 9 degrees Fahrenheit below the**
19 **temperature that water would be at that kind of**
20 **rolling boil; is that correct?**

21 **A. Correct.**

22 **Q. Do you know whether at that temperature,**
23 **basically, 5 degrees Celsius below a rolling**
24 **boil -- could human beings even withstand that**
25 **temperature for even a few minutes?**

1 **A. I don't know how long they could**
2 **withstand it, but it wouldn't be something you**
3 **would want to be in.**

4 **Q.** Okay. And I think you said you tested it
5 for eight hours?

6 **A. Correct.**

7 **Q.** Would you put your hand in 95 degree
8 Celsius water for even a second?

9 **A. No.**

10 **Q.** If you did, would you expect that you'd
11 be burned?

12 **A. Yes.**

13 **Q.** Do you know, then, whether the testing
14 that you did at 95 degrees Celsius -- and I
15 understand you picked the numbers, the range that
16 the sheriff's department gave you. But do you
17 believe that that testing, then, at 95 degrees
18 Celsius would be an accurate representation of --
19 of temperatures that people sat in for two hours?

20 **A. I did not believe that.**

21 **Q.** Okay. You were asked some questions
22 about when you started your analysis and when you
23 finished. The date on the report is
24 February 4th, 2010; is that correct?

25 **A. Correct.**

1 **Q.** By that point had your report already
2 been reviewed by the peer review and your
3 supervisor?

4 **A. No.**

5 **Q.** And so tell us how that works where a
6 supervisor or someone does a review of the report.

7 **A. What happens is I finish the report,**
8 **print out a copy, include all of my notes that I**
9 **took during the analysis. I give it to a person**
10 **who is technically competent in the area of the**
11 **case that I've worked and ask them to technically**
12 **review all of my work to see if they agree with it.**
13 **If they agree with it, they sign off on it.**

14 **It then goes to an administrative**
15 **reviewer that checks to make sure the numbers are**
16 **correct, everything is spelled correctly and that**
17 **sort of thing. Once they agree that all of that is**
18 **correct, they put their initials on it, and then it**
19 **is sent up to our secretary to then mail out the**
20 **report.**

21 **Q.** And prior to that point, then, do you
22 know whether Mr. Sperk or Mr. Figerelli -- did you
23 have any conversations with them prior to when you
24 formally submitted the report to let them know how
25 the case was progressing?

1 **A. I did not.**

2 **Q.** You did, though, appear to have some
3 conversations with them over different times and
4 you noted -- did you note your conversations with
5 your supervisors also in this report?

6 **A. Dave Sperk is my supervisor, or was my**
7 **supervisor at the time.**

8 **Q.** And that was a bad question on my point.
9 When you talked to Mr. Sperk or Mr. Figerelli about
10 the case, did you always make a note of that in the
11 communications log?

12 **A. I noted anything that was pertinent to**
13 **the case. If they just asked, hey, are you working**
14 **it, I wouldn't have noted that.**

15 **Q.** If they asked have you found anything yet
16 or something like that, would you note that?

17 **A. No.**

18 **Q.** Okay. You were asked some questions
19 about coming to this courthouse to testify. Do you
20 remember that?

21 **A. Yes.**

22 **Q.** And do you remember what day it is you
23 came up to testify?

24 **A. It was the first week in May, that**
25 **Friday.**

1 **Q.** Okay. And you -- you indicated that you
2 and I had a conversation?

3 **A. A brief one. Yes.**

4 **Q.** Out in the hallway --

5 **A. It was in the room.**

6 **Q.** -- or in the little room you were sitting
7 in?

8 **A. Yes.**

9 **Q.** And what did we talk about?

10 **A. You asked me whether I had a copy of --**
11 **of the transcript from my original defense**
12 **interview. I said no. I think you talked about**
13 **when I would get on the stand and that whoever was**
14 **on the stand before me was taking longer than you**
15 **thought. And that was about it.**

16 **Q.** At some point did -- did -- did it appear
17 that you weren't going to make it on the stand that
18 day?

19 **A. Yes.**

20 **Q.** Okay. And what time of the day did it
21 make that appearance to you?

22 **A. I think it was after 4:00 p.m.**

23 **Q.** Okay. Did -- did we have you sitting
24 around the afternoon waiting to testify?

25 **A. Yes.**

1 Q. And I believe you told Ms. Do after that
2 you took a trip, a vacation?
3 A. **I did.**
4 Q. Where did you go on your vacation?
5 A. **I went to Hawaii.**
6 Q. And how long were you in Hawaii for?
7 A. **12 days.**
8 Q. Do you know if -- and what days were you
9 in Hawaii for? Do you remember?
10 A. **The 10th through the 21st.**
11 Q. And how many -- do you recall how many
12 days after you testified you got on the plane to go
13 to Hawaii -- or after the day you came to testify
14 but didn't get to?
15 A. **Four days maybe.**
16 Q. Okay. You were here on a Friday?
17 A. **Yes.**
18 Q. And you got on the plane on a Tuesday?
19 A. **Tuesday.**
20 Q. Okay. Did you want to come back here on
21 a Tuesday and miss your trip to Hawaii?
22 A. **I did not.**
23 Q. Okay. In fact, did you tell us something
24 about -- before you came up on that Friday that I
25 can come today and testify but don't look for me

1 for the next two weeks?
2 A. **Pretty much. Yes.**
3 Q. Okay. And do you know if whether while
4 you were in Hawaii a medical doctor testified about
5 the chemicals that you mentioned in your -- in your
6 report?
7 A. **I do not know went on -- what went on
8 when I was in Hawaii or, for that matter, anytime
9 during the case.**
10 Q. Or do you know whether your report was at
11 that point admitted so the jury could see what
12 those findings were?
13 A. **I do not know.**
14 Q. Okay. Now, with respect to the report
15 and your conclusions, the chemicals that were
16 heated up to 50 degrees Celsius, which is -- did
17 you say it's about 120 degrees Fahrenheit?
18 A. **Around there. It's about 122, I believe.**
19 Q. Okay. When you -- can you tell us what
20 a -- how it is that a chemical can be detected when
21 you heat up an object like a rock or a log or a
22 piece of plastic?
23 A. **You can either, as I did, collect that
24 volatile on a carbon strip or you could sample the
25 gas above that rock or tarp directly and directly**

1 **inject that gas into the instrument.**
2 Q. And in this particular case did you --
3 for example, let's -- let me ask you about no
4 volatiles were detected in 305, 345, 358, 502, 562,
5 and 564. Are those -- what are those substances
6 that -- that nothing was detected in at that
7 temperature?
8 A. **What each of those items are?**
9 Q. Let -- let me ask you this: Would you
10 disagree if it was a rock, a rock, cross-cut
11 section of the sweat lodge, a log, or a piece of a
12 log, a piece of a pole, and a piece of a pole?
13 A. **No. I wouldn't disagree with that.**
14 Q. Okay. In fact, are those -- the -- the
15 index, if you will, for what those are, is that set
16 forth on page 1 of your report?
17 A. **Yes, it is.**
18 Q. Now, in this particular case, what does,
19 no volatiles were detected in those items -- what
20 does that mean?
21 A. **That means based on the analysis I did,
22 using the temperatures I used, the method I
23 performed the extraction at, I didn't detect any
24 volatiles.**
25 Q. And with respect to the tarps, for

1 example, did you have the tarps in a container that
2 kind of looked like this?
3 A. **Yes.**
4 MR. HUGHES: And for purposes of the record,
5 I'm holding up a metal paint can.
6 Q. Did you take the tarps out to test them
7 or did you test them inside the metal paint can?
8 A. **I tested them inside the metal paint can.**
9 Q. And as you tested, did you -- you -- I
10 think you told us you put a little carbon strip in
11 that paint can. Is that correct?
12 A. **That's correct.**
13 Q. Did you then seal the can up?
14 A. **I reup the lid back on. Yes.**
15 Q. And then did you stick it in, basically,
16 an oven for eight hours?
17 A. **Yes.**
18 Q. And at the end of the time, you then
19 washed that little carbon strip with some solvent
20 to see what was on the carbon strip; correct?
21 A. **Yes.**
22 Q. Do you know whether -- with respect to
23 the two items where you did find the chemicals,
24 item No. 356, which was a cross-cut of the tarp,
25 and item No. 500, which was a piece of a wood log,

1 do you know whether the testing that you did with a
2 volume of one-gallon container less whatever size
3 the substance inside is filling up -- is that --
4 does that give any sort of a significant number
5 that you can extrapolate to how much of the
6 chemical would have been in a much bigger structure
7 where, for example, that tarp was tested?

8 **A. I wouldn't be able to do that**
9 **correlation.**

10 **Q.** And can you explain the reason why.

11 **A. You're asking why I couldn't correlate it**
12 **to what was in the lodge itself, what was in the**
13 **air space in the lodge --**

14 **Q.** Yeah.

15 **A. -- or could I correlate it to the whole.**
16 **I couldn't because I don't know what the**
17 **temperature was in the lodge. There may have been**
18 **different temperatures depending on where you were**
19 **in the sweat lodge. It may have been hotter up**
20 **near the top of the sweat lodge than it was down**
21 **near the soil.**

22 **And to extrapolate all the way around,**
23 **you would have to have a closed system and you**
24 **would have to have knowledge of everything that was**
25 **there. You would almost, essentially, have to**

1 **rebuild the sweat lodge on a certain scale and test**
2 **around there to actually get and correlate to what**
3 **was in the lodge.**

4 **Q.** Now, for the testing that you did that
5 you did find some substances, did you -- for this
6 2-ethyl-1-hexanol, did you need a known standard to
7 determine that there was 2-ethyl-1-hexanol?

8 **A. I did.**

9 **Q.** And did you happen -- is that a standard
10 you purchased for this case or did the lab have it
11 on hand?

12 **A. I don't know which it was. We either had**
13 **it on hand or I purchased it, one of the two.**

14 **Q.** Had you had to test soft plastics like
15 vinyl tarps before?

16 **A. They've been included in things I've**
17 **tested before.**

18 **Q.** And in those cases have you found
19 chemicals like 2-ethyl-1-hexanol and 2-ethylhexyl
20 acetate?

21 **A. I haven't found those chemicals before.**
22 **What sort of sample they came from, I don't know**
23 **because a lot of the samples that come in are**
24 **charred debris.**

25 **Q.** If you were to heat soft plastic like a

1 tarp up, would you expect to see volatiles that
2 come from plastic?

3 **A. I would.**

4 **Q.** Would it surprise you if you didn't see
5 volatiles from plastic?

6 **A. It would surprise me.**

7 **Q.** Now, with respect to the alpha-terpineol
8 and the -- and I'm not going to pronoun -- try and
9 pronounce that either. It's been a long time since
10 I took chemistry.

11 You called those terpenites or terpenes?

12 **A. Terpenes.**

13 **Q.** Now, have you had to test wood before in
14 your laboratory?

15 **A. I have.**

16 **Q.** Do you do that in arson cases?

17 **A. A lot.**

18 **Q.** When you test wood, have you ever seen
19 these terpenes before?

20 **A. I have.**

21 **Q.** How common is it to find terpenes in
22 wood?

23 **A. It's fairly common.**

24 **Q.** Now, with respect to the other testing,
25 the 95 degrees Celsius -- or Centigrade for eight

1 hours, when you were done testing the metal cans,
2 for example, for eight hours in 95 degrees
3 Centigrade, did you reach into the oven with your
4 bare hands and pull out the metal container?

5 **A. I did not. I used gloves to pull them**
6 **out.**

7 **Q.** Would you handle something that was 95
8 degrees?

9 **A. Not for very long.**

10 **Q.** Do you know what an MSDS sheet is?

11 **A. Yes.**

12 **Q.** What's an MSDS sheet?

13 **A. Materials safety data sheet.**

14 **Q.** And can you tell us what they are.

15 **A. They are typically produced in response**
16 **to chemicals that are used in certain items, maybe**
17 **paint or something, telling you if they're**
18 **flammable, what toxicity it may have, what's --**
19 **what protection you should use if you're dealing**
20 **with this chemical.**

21 **Q.** Does your laboratory keep MSDS sheets for
22 the chemicals that you use in the laboratory?

23 **A. We actually just use a database of MSDS**
24 **sheets.**

25 **Q.** That was a bad question. Do you have the

1 physical paper sheets?

2 **A. We have in the past. We currently do**
3 **not. We use a -- a computer database.**

4 **Q.** Does the database have the information --
5 or digital version of the MSDS sheets?

6 **A. Yes.**

7 **Q.** In your work in determining -- say you
8 spill something on your hand or you get a whiff of
9 a fume and you're concerned about it, do -- do you
10 go to the MSDS to see if you should be concerned or
11 not?

12 **A. You can. I can't say that I ever have.**
13 **I typically take precautions not to let that**
14 **happen.**

15 **Q.** Okay. Is there a reason -- is there a
16 requirement that laboratories have MSDS sheets on
17 hand?

18 **A. Yes.**

19 **Q.** And do you know why they have that
20 requirement?

21 **A. So that if you have an exposure, you can**
22 **know how to treat it. Or if you have a spill, how**
23 **it has to be cleaned up.**

24 **Q.** You were asked whether you personally
25 received soil samples in this case?

250

1 **A. Yes.**

2 **Q.** I think you indicated you thought they
3 went to the Flagstaff lab?

4 **A. Yes.**

5 **Q.** Do you know why they'd go to the
6 Flagstaff lab and not your laboratory?

7 **A. Typically things from northern agencies**
8 **go to the Flagstaff lab first, and then we have a**
9 **courier that runs weekly between Flagstaff and**
10 **Phoenix. So then it is closer for the agencies**
11 **that are northern to go there, and then we have a**
12 **courier that runs.**

13 **Q.** And do you know, then, why some samples
14 went to you in Phoenix for testing and some went up
15 to Flagstaff?

16 **A. No.**

17 **Q.** Is that a decision that lab supervisors
18 make regarding how busy people are?

19 **A. As to which laboratory it goes to?**

20 **Q.** Which laboratory it goes to or which --
21 or whether samples are tested or not tested.

22 **A. Lab supervisors and managers can make**
23 **decisions as to what cases are run and -- and the**
24 **order that they're tested and who's going to test**
25 **it, what analyst.**

1 **As far as which laboratory it goes to, I**
2 **don't know if they care, per se, because we have**
3 **runners that go between laboratories.**

4 **Q.** And in this particular case, if the soil
5 samples were submitted, do you know why they were
6 never tested?

7 **A. I do not know.**

8 **Q.** Is that information contained in any way
9 on the sheet that you have in front of you, the
10 submission -- the submittal sheet?

11 **A. They're not on the submission form that I**
12 **received for the items that I've analyzed.**

13 **Q.** Would there have been a separate
14 submittal sheet for the soil samples?

15 **A. There would have been.**

16 **Q.** Would you have any reason to disagree if
17 the detective were to testify that the Flagstaff
18 lab didn't want to test the soil samples?

19 **A. I wouldn't have a reason to disagree.**
20 **However, Flagstaff does not do trace analysis up**
21 **there. It would automatically come down to**
22 **Phoenix. But it may have been a decision made**
23 **somewhere else as to whether to send them to**
24 **Phoenix or not.**

25 **Q.** And who would have made that decision?

252

1 **A. I don't know. A manager in Flagstaff, a**
2 **manager in Phoenix.**

3 **Q.** And are you privy to all those decisions?

4 **A. I am not.**

5 **Q.** You were asked some questions and I've
6 been asking you some questions about these
7 particular chemicals, and you indicated that
8 they're a solvent?

9 **A. Yes.**

10 **Q.** And do solvents have a particular
11 temperature at which they vaporize?

12 **A. They do.**

13 **Q.** And do solvents in general have a
14 temperature that's lower than other chemicals where
15 they vaporize?

16 **A. Yes. Typically.**

17 **Q.** And can you -- can -- for example, if
18 I've got a -- a beaker of gasoline, gasoline is a
19 solvent?

20 **A. Yes.**

21 **Q.** And would gasoline have a lower vapor
22 point? In other words, if I heat it up, it's going
23 to turn to vapor more quickly than something like,
24 for example, water; is that correct?

25 **A. That is correct.**

1 Q. And would it surprise you, then, that a
2 solvent would be found at this 50-degree Centigrade
3 temperature that you tested the items at?

4 A. It would not be unusual.

5 Q. Now, in these cans with the strips of
6 cloth and tarp, there are a couple little, tiny
7 hard carbonlike objects. Did you leave the carbon
8 strips in the cans when you were done testing?

9 A. After doing the extraction with the
10 carbon strip, half of each carbon strip is saved
11 for analysis by someone else without anything done
12 to it by me. I don't put any solvent on it. I
13 don't do anything other than take half of it after
14 it's been heated and preserve it for further
15 analysis by someone else. So that automatically
16 goes back into the sample. The half of the strip
17 that I analyzed does not go back into that can.

18 Q. You were asked a chronology and asked if
19 you did a defense interview in June of 2010. Do
20 you recall being asked about that?

21 A. Yes.

22 Q. In June were you asked at all -- were you
23 asked about organophosphates?

24 A. No.

25 Q. When was the first time that you were

1 asked in this case about organophosphates?

2 A. When I talked to the county attorney,
3 Sheila Polk, at some time -- at the end of April.

4 Q. And after you spoke to her, is that when
5 you then -- let me ask you this: Did you -- were
6 you asked by my office to come to court and testify
7 after you spoke to Ms. Polk?

8 A. At some time after that point I was. I
9 actually received a subpoena before that also.

10 Q. And after, then, you talked to Ms. Polk
11 in the end of April, is that when you came and sat
12 here in -- in the courthouse for a half a day or
13 so?

14 A. Yes.

15 Q. And then took your Hawaiian vacation?

16 A. And then took my vacation.

17 Q. With respect to these -- the -- the
18 testing strips, you indicated that the testing
19 strips for the 50-degree testing, you kept half of
20 them in case anyone wanted to test them in the
21 future?

22 A. Yes.

23 Q. Did you do the same thing with respect to
24 the testing strips for the items that were heated
25 up to the 95 degrees?

1 A. Yes, I did.

2 Q. Is that what is indicated, then, in this
3 line here, that one half of each strip was placed
4 into a laboratory vial and retained with the
5 evidence?

6 A. Yes.

7 MR. HUGHES: Thank you, Ms. Sy. You've been
8 very -- very patient with me.

9 THE COURT: Thank you, Counsel.

10 Redirect, Ms. Do?

11 MS. DO: Thank you, Your Honor.

12 REDIRECT EXAMINATION

13 BY MS. DO:

14 Q. I'm going to try to get you out of here
15 because you don't want to drive back up from
16 Phoenix; right?

17 A. If I don't have to, that would be nice.

18 Q. Okay. Mr. Hughes asked you some question
19 about whether or not you could do some sort of
20 analysis to quantify how much of the chemicals you
21 found were actually present at the scene.

22 Do you remember that question?

23 A. Yes.

24 Q. You indicated that you could not because
25 you would have to rebuild the sweat lodge.

1 A. Essentially. If you wanted to get
2 accurate results.

3 Q. So if you wanted accurate, truthful
4 information about what was at the scene, you would
5 have to rebuild the sweat lodge?

6 A. Yes.

7 Q. So if you were talking to the case agent,
8 for example, on October 8 or October 9, would you
9 have advised the case agent to have preserved the
10 sweat lodge if it was possible?

11 A. I probably would not have because at that
12 point it would have cooled off in there and these
13 volatiles probably would have escaped because it's
14 a not a vapor-tight container, if you will.

15 Q. Okay. Understood. When you said, need
16 to rebuild the sweat lodge, would it have been
17 helpful for you to have known the -- the -- the
18 dimensions of the structure if you were to go back
19 and do any kind of analysis to extrapolate how much
20 of the evidence you found might have been contained
21 at the scene?

22 A. You would have to do that sort of thing.

23 You would also have to know accurate temperatures.

24 Again, it would be different around the sweat

25 lodge, potentially, so you would have to sample in

1 a bunch of different areas. There would be many
2 things you would need to know that I didn't know to
3 be able to do that.

4 Q. That you can't replicate once the sweat
5 lodge is gone?

6 A. You may be able to -- if you know
7 everything that was used, you can take some of the
8 things and rebuild it to a certain scale. You can
9 do a percentage scale --

10 Q. Okay.

11 A. -- and do that. But you would need to
12 know a lot of things.

13 Q. What about taking more than just four
14 ten-by-ten inch cross-sections of the sweat lodge
15 materials?

16 A. You may have detected something different
17 if those samples weren't representative of the
18 whole. I don't know that. You, again, would have
19 to test it.

20 Q. Okay. So if -- as you told the jury
21 under direct examination, if hypothetically you
22 tested less than 1 percent of the sweat lodge
23 materials, if you had more, there is no way for you
24 to tell this jury whether or not you could have
25 found more or different chemicals?

1 A. I wouldn't know unless I tested it.

2 Q. Now, you also were asked questions by
3 Mr. Hughes about whether or not it was surprising
4 to you to find 2-ethyl-1-hexanol in plastics.

5 Do you remember that?

6 A. Yes. I think he asked me that.

7 Q. Okay. And I think I asked you that too
8 under direct.

9 Now, you had four paint cans of tarps and
10 materials; correct?

11 A. Correct.

12 Q. And you tested two?

13 A. Correct.

14 Q. Evidence item 356?

15 A. Yes.

16 Q. And that was the one where you found the
17 presence of 2-ethyl 1-hexanol?

18 A. Yes.

19 Q. In -- in plastics; right?

20 A. Potentially. There were plastics there.
21 I don't know where it came from.

22 Q. In the second can that you tested, the
23 358, that was also a can of tarps and materials,
24 also plastic materials?

25 A. Correct.

1 Q. And no 2-EH was detected in that can?

2 A. That's correct.

3 Q. And that would have been at the 50 degree
4 Celsius or 122 degrees Fahrenheit?

5 A. Correct.

6 Q. And, again, I understand Mr. Hughes asked
7 you some questions about the temperatures, the
8 95 degrees Celsius being above boiling point.

9 You --

10 A. Just below.

11 Q. Just below. I'm sorry.

12 You didn't make up those numbers. Those
13 were provided to you by the case agent?

14 A. Whoever filled out the request form.

15 Q. Now, you came back from your Hawaiian
16 vacation May 21st, I understand?

17 A. Yes.

18 Q. Did you know whether or not the state
19 rested its case on June 3rd, 2010, just last
20 Friday?

21 A. I did not know. I called sometime during
22 that week after I returned. I returned on a
23 Sunday. I called either Tuesday or Wednesday,
24 because I knew court would start up on Thursday, to
25 see if they would need me.

1 Q. You were available to the state if they
2 wanted to call you after May 21st?

3 A. Correct.

4 Q. And you would have complied with their
5 subpoena and request and testified to this jury if
6 the state wanted the jury to hear from you?

7 A. Correct.

8 Q. Now, with respect to the questions
9 Mr. Hughes asked you about Dr. Fischione, the jury
10 has heard from the medical examiners, Dr. Lyon and
11 Dr. Mosley. They testified in this case. Were you
12 aware of that?

13 A. I was not aware of who testified.

14 Q. All right. Anywhere in your notes or
15 from your memory have you ever spoken to a
16 Dr. Mosley, who autopsied Ms. Liz Neuman?

17 A. I have not.

18 Q. Would it surprise you if the jury had
19 heard from Dr. Mosley that the first time he'd seen
20 your report was in this trial?

21 A. It wouldn't surprise me per se. But I
22 wouldn't know whether he got it or not.

23 Q. All right. Mr. Hughes asked you about
24 Dr. Fischione. Let me ask you, did you ever have
25 any conversations with Dr. Lyon or is it noted

1 anywhere in your communications log that someone
2 from your lab spoke to Dr. Lyon?

3 **A. No.**

4 **Q.** Would it surprise you to learn that this
5 jury heard from Dr. Lyon that the first time he'd
6 seen your report was also in this trial?

7 **A. Again, it doesn't surprise me.**

8 **Q.** All right. You had told us earlier that
9 if someone wanted to know whether these particular
10 chemicals were toxic, you'd want to talk to the
11 medical examiner?

12 **A. Yes.**

13 **Q.** Mr. Hughes asked you about the
14 October 14, 2009, the request that came from the
15 representative of the County of -- Yavapai County
16 Sheriff's Office. And now you remember it was
17 Detective Diskin?

18 **A. Well, now I know it was based on the**
19 **interview that we had done back in June.**

20 **Q.** June. All right. So Detective Diskin,
21 the case agent, called you on October 14 and said
22 that he wanted evidence items to be tested for
23 toxic volatiles?

24 **A. Correct.**

25 **Q.** On that date, Ms. Sy, did

1 Detective Diskin tell you whether or not he had
2 spoken to a witness who suggested to him that the
3 wood that was used to burn the rocks may have been
4 involved in this case in terms of the -- the
5 deaths?

6 **MR. HUGHES:** Objection. Misstates the
7 evidence.

8 **THE COURT:** Overruled.

9 You may answer that.

10 **Q.** BY MS. DO: Did Detective Diskin tell you
11 that on October 14?

12 **A. He did not.**

13 **Q.** All right. So independent of
14 Detective Diskin, you, being a criminalist, also
15 thought from what you heard that the wood might be
16 an issue, being pressure treated?

17 **A. I just knew that if it was pressure**
18 **treated, there could be things in there that could**
19 **potentially be toxic or something we might want to**
20 **look at.**

21 **Q.** Okay. But it wasn't looked at?

22 **A. I did not look at it.**

23 **Q.** All right. So, as you sit here today
24 with the questions you had about treated wood,
25 pressure-treated wood, and if Detective Diskin had

1 that, your test did not eliminate the question of
2 whether the wood was pressure treated?

3 **A. I did nothing to tell you whether it was**
4 **pressure treated or not.**

5 **Q.** Okay. And in terms of the
6 organophosphates, on October 14, 2009, if the case
7 agent had reviewed his own evidence and discovered
8 a tape in which a first responder had said that
9 they thought based upon the signs and symptoms it
10 could have been carbon monoxide, carbon monoxide
11 mixed in with organophosphates -- if the case agent
12 had done that and talked to you on
13 October 14, 2009, you would have been able to
14 suggest the appropriate test for organophosphates;
15 correct?

16 **A. I could have suggested a test. Yes.**

17 **Q.** That wasn't done on October 14?

18 **A. I was not asked about that.**

19 **Q.** All right. Mr. Hughes asked you about
20 whether or not you needed to have standards for
21 comparison if you were to test for
22 organophosphates. Do you remember that?

23 **A. Yes.**

24 **Q.** Okay. Those standards do exist?

25 **A. Yes.**

1 **Q.** And you could get them if you needed
2 them?

3 **A. Yes.**

4 **Q.** And in this case if the case agent had
5 reviewed his own evidence and learned that
6 organophosphates may be an issue while at the scene
7 on October 9, for example, and gone into a utility
8 shed -- this is a hypothetical -- gone into a
9 utility shed and found what was used in terms of
10 chemicals, that could have provided a further lead
11 in terms of what to test for?

12 **A. It may have. I -- I don't know what**
13 **would happen at the scene and what he would ask me.**
14 **That would depend on his investigation.**

15 **Q.** Okay. So let me give you this
16 hypothetical. If the case agent on October 9 had
17 reviewed an October 8th statement in his own
18 evidence about organophosphates, while at the scene
19 had gone into the utility shed to see what was used
20 at Angel Valley and discovered pesticides were
21 used, then you would have something to compare it
22 to to look for?

23 **A. Yes.**

24 **Q.** But if that isn't done, if that clue is
25 ignored on October 8, October 9, then it makes the

1 job for you as a criminalist looking for the -- the
2 possibility of organophosphates harder?

3 **A. Yes. Again, organophosphates would be**
4 **something that the laboratory sent out because we**
5 **don't have the equipment to do that analysis. But**
6 **for other people to analyze, it would be easier if**
7 **they knew what they were looking for.**

8 **Q.** Okay. But because the clues were -- if
9 the clues were ignored, it makes the job harder?

10 **A. Yes.**

11 **Q.** But not impossible?

12 **A. That is correct.**

13 **Q.** So if on October -- I'm sorry.

14 If on April -- the end of April 2011, for
15 example, Ms. Polk and Detective Diskin had a
16 question about organophosphates -- at that time did
17 they ask you, Ms. Sy, is it possible to take the
18 soil samples we still have in evidence sitting here
19 in the courtroom to test?

20 **A. I don't recall if they asked that. I**
21 **recall that they asked me about whether I would**
22 **have detected it in the analysis I did. I don't**
23 **recall them asking about whether it could be**
24 **tested.**

25 **Q.** Okay. And, in fact, during the entire

1 pendency of this case, from the time the accident
2 occurred on October 8, 2009, to the time of the end
3 of April 2011, you never spoke to anyone from the
4 county attorney's office regarding the test and
5 analysis you conducted at the request of
6 Detective Diskin?

7 **A. Outside of the defense interview that we**
8 **did and they were present for --**

9 **Q.** Yes.

10 **A. -- that's the only time I've spoken about**
11 **it.**

12 **Q.** And my last question to you, Ms. Sy. It
13 was Detective Diskin who, on October 14, 2009,
14 asked you about toxic volatiles?

15 **A. Correct.**

16 **Q.** So I would assume that based upon that
17 conversation, Detective Diskin understood that you
18 were the criminalist assigned on this case?

19 **A. I don't think he would have known that**
20 **when he originally called. I think he probably**
21 **just asked for someone in trace, which, if my**
22 **supervisor had been there, he might have been the**
23 **one that answered the call. I may have indicated**
24 **that I would be the person or that I'm capable of**
25 **doing it. I don't really know.**

1 **Q.** Okay. Was it easy to reach you? I mean,
2 you're in the directory?

3 **A. Yes. We are in the directory of**
4 **criminalists that they use.**

5 **Q.** So after October 14, 2009, when the
6 detective asked you about toxic volatiles at the
7 scene, submitted a request for evidence to be
8 tested before the indictment was returned on
9 February 3rd, 2010, did Detective Diskin ever call
10 you and ask you, Ms. Sy, do you have any results
11 and what are they?

12 **A. No.**

13 **Q.** After Mr. Ray was indicted on
14 February 3rd, 2010, when you sent out the report
15 dated February 4, 2010, did Detective Diskin ever
16 call you and ask you, hey, I asked for evidence to
17 be tested? What does this mean?

18 **A. No.**

19 **Q.** The first time you were ever asked about
20 your results or your test by Detective Diskin was
21 on that same phone call at the end of April 2011?

22 **A. Yes. Again, it was asked by the county**
23 **attorney, Sheila Polk.**

24 **Q.** I understand. He was on the phone call?

25 **A. Okay.**

1 **Q.** Is that right?

2 **A. I think so. I didn't know that he was on**
3 **the phone call.**

4 **Q.** And that was while we were already in
5 trial. Do you know that?

6 **A. Yes.**

7 **Q.** Do you have any idea whether or not,
8 since it was the end of April 2011 -- and I want
9 you to assume that Detective Diskin testified to
10 this jury under cross by Mr. Kelly April 29 --
11 whether it occurred around that same time frame?

12 **A. Can you repeat the question?**

13 **Q.** Sure. You said that the call occurred at
14 the end of April 2011.

15 **A. Okay.**

16 **Q.** That was the first -- is that right?

17 **A. Yes.**

18 **Q.** And that was the first time
19 Detective Diskin ever asked you or was present in a
20 conversation where it was asked by the state what
21 your tests actually involved; right?

22 **A. Correct.**

23 **Q.** My question is, do you know whether or
24 not that was prompted by Detective Diskin's
25 cross-examination by Mr. Kelly about the presence

1 of 2-ethyl-1-hexanol in your report?

2 **A. I do not know what prompted it.**

3 **Q.** But 17 months after the accident, in
4 trial, is the first time anyone from the state
5 asked you about your analysis?

6 **A. Correct.**

7 MS. DO: Thank you.

8 I have no further questions, Your Honor.

9 THE COURT: Thank you.

10 Counsel, are there any questions for this
11 witness?

12 Ms. Rybar?

13 Okay.

14 Then, ladies and gentlemen, we will go
15 ahead and take the evening recess at this time.
16 Please remember the admonition. And I -- I have a
17 question here about scheduling. And I'll address
18 that tomorrow morning. I want talk to the
19 parties -- the attorneys about that. Someone
20 submitted that.

21 And, Ms. Sy, thank you. Technically you
22 may be called back. So please continue to follow
23 the rule of exclusion in this case and try not to
24 communicate with anyone else about the case or your
25 testimony until the trial is over. Okay?

1 THE WITNESS: Yes, Your Honor.

2 THE COURT: Then we will be in recess at this
3 time. Thank you very much.

4 (The proceedings concluded.)

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1 STATE OF ARIZONA)
2 COUNTY OF YAVAPAI) ss REPORTER'S CERTIFICATE

3

4 I, Mina G. Hunt, do hereby certify that I
5 am a Certified Reporter within the State of Arizona
6 and Certified Shorthand Reporter in California.

7 I further certify that these proceedings
8 were taken in shorthand by me at the time and place
9 herein set forth, and were thereafter reduced to
10 typewritten form, and that the foregoing
11 constitutes a true and correct transcript.

12 I further certify that I am not related
13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
15 interested in the result of the within action.

16 In witness whereof, I have affixed my
17 signature this 17th day of July, 2011.

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MINA G. HUNT, AZ CR No. 50619
CA CSR NO. 8335


1 STATE OF ARIZONA)
2) ss: REPORTER'S CERTIFICATE
3 COUNTY OF YAVAPAI)

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